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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

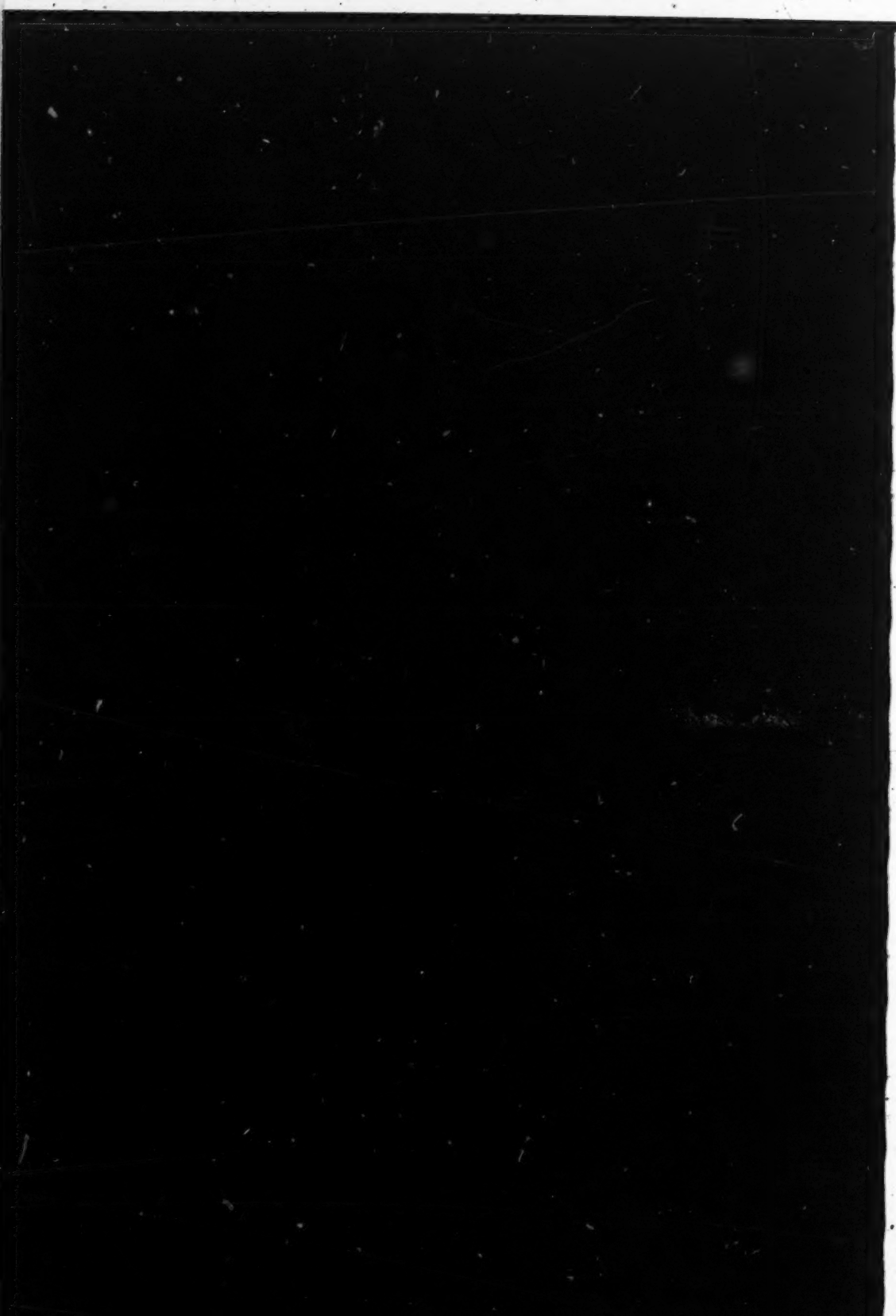
—against—

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BERNARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI—FILED JULY 22, 1971
CERTIORARI GRANTED—OCTOBER 25, 1971



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Relevant Docket Entries

May 13, 1966	—	Filed petition and record on removal including complaint
May 20, 1966	—	Filed plaintiff's interrogatories
May 26, 1966	—	Filed defendant's answer
June 2, 1966	—	Filed defendant's answer to Interrogatory No. 1
July 11, 1966	—	Filed defendant's answer to Interrogatory No. 2
August 14, 1967	—	Filed defendant's answer to interrogatories dated June 1, 1967
January 30, 1969	—	Filed defendant and third-party plaintiff's third-party complaint against Erie Lackawanna Railroad Company
August 26, 1969	—	Filed third-party defendant's answer to third-party complaint
January 14, 1970	—	Filed amended answer of defendant
April 30, 1970	—	Filed Judgment #70670 in the sum of $200,000 in favor of plaintiff and against Atlantic Coast Line Railroad Company, defendant, with costs
June 1, 1970	—	Filed notice of appeal of defendant and third-party plaintiff Atlantic Coast Line Railroad Company from judgment in favor of plaintiff
July 2, 1970	—	Filed third-party plaintiff's affidavit and notice of motion for an order setting

		aside verdict of jury against defendant Atlantic Coast Line Railroad Company and for a new trial dated May 8, 1970
July 2, 1970	—	Filed affidavit of Lloyd W. Roberson, attorney for third-party defendant, in opposition to notice of motion dated May 8, 1970
July 2, 1970	—	Filed third-party defendant's affidavit and notice of motion for an order to dismiss third-party complaint, set aside verdict in favor of plaintiff and against defendant and for a new trial dated April 27, 1970
July 2, 1970	—	Filed Opinion #36934 by Cooper, J. dated July 2, 1970 denying motions of defendant and third-party defendant to set aside the verdict of plaintiff on various grounds and dismissing claim of third-party plaintiff Atlantic against third-party defendant Erie for contribution as a matter of law
July 17, 1970	—	Filed Final Judgment in favor of Third Party Defendant and against Third Party Plaintiff
July 20, 1970	—	Filed amended notice of appeal of defendant Atlantic from order entered in this action in favor of Erie, third-party defendant, against Atlantic on July 2, 1970 dismissing the third-party complaint and the judgment entered thereon July 17, 1970

June 15, 1971	—	Filed opinion and judgment of the Court of Appeals affirming the District Court's judgments against defendant and third party plaintiff
July 22, 1971	—	Filed Petition for Writ of Certiorari by Atlantic Coast Line Railroad Company with the Supreme Court of the United States
August 22, 1971	—	Filed Brief for Respondent Erie Lackawanna Railroad Company in Opposition with the Supreme Court of the United States
October 26, 1971	—	Petition for Certiorari granted by the Supreme Court of the United States

Petition for Removal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

The petition of Atlantic Coast Line Railroad Company respectfully shows to this Court and alleges:

First: That your petitioner is the defendant in the above action which was instituted in the Supreme Court of the State of New York, County of New York, on May 5, 1966 by the service of a summons and complaint. Attached hereto and marked Exhibits "A" and "B", respectively, are copies of said summons and complaint. That less than twenty days have elapsed since the service of said summons and complaint.

Second: Upon information and belief, the plaintiff, as appears from the summons herein, resides at 504 3rd Avenue, Lyndhurst, New Jersey and is a citizen and resident of the State of New Jersey. The plaintiff is not an employee of defendant. According to Paragraph Sixth of the Complaint, he is an employee of the Erie Lackawanna Railroad Company.

Third: That your petitioner was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws of the State of Virginia and is a citizen and resident of that State. It has its principal place of business at 500 Water

Street, Jacksonville, Florida 32202. It is not incorporated in the State of New York, nor does it have its principal place of business in the State of New York.

Fourth: That this is a civil action at law now pending in the Supreme Court of the State of New York, County of New York, and was brought by the plaintiff Theodore Benazet to recover the sum of $135,000 for personal injuries said to have been sustained by him on July 30, 1964 while working aboard a car float in the Hudson River between New York and New Jersey, which were caused by alleged defective braking equipment aboard defendant's freight car ACL 28224.

Fifth: That your petitioner desires to remove this suit from the Supreme Court of the State of New York, County of New York, to the United States District Court for the Southern District of New York in accordance with the provisions of Title 28 United States Code, Sections 1441 and 1446, regulating the removal of cases from state courts.

Sixth; That your petitioner has made and hereby offers in this Court its bond with good and sufficient security conditioned that it as such defendant will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that this cause of action was not removable or was improperly removed.

Wherefore your petitioner prays that this petition and bond herewith submitted be accepted as good and sufficient security and that the said action be removed to this Court from the Supreme Court of the State of New York, County

of New York, and upon the filing of this petition and bond herein and service of a copy thereof upon plaintiff's attorneys, a copy of the petition be filed with the Clerk of the Supreme Court of the State of New York, County of New York, and that said Court proceed no further therein unless the case be remanded.

Dated: New York, N. Y.
May 12, 1966

ATLANTIC COAST LINE RAILROAD COMPANY

By: FRANCIS J. PRIMOSCH /s/
Assistant Vice President

Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[CAPTION OMITTED]

Plaintiff, complaining of the defendant, by Bromsen & Gammerman, his attorneys, respectfully alleges:

First: On information and belief, at all times herein mentioned, the defendant was a railroad corporation organized and existing under and by virtue of the laws of the State of Virginia.

Second: On information and belief, at all times herein mentioned, defendant has been and still is doing business in the County, City and State of New York.

Third: At all times herein mentioned the defendant has a principal place of business in the County, City and State of New York.

Fourth: At all times herein mentioned the defendant was and now is a common carrier by rail engaged in interstate commerce between different states in the United States.

Fifth: At all times herein mentioned defendant owned a certain railroad freight car designated ACL 28244.

Sixth: At all times herein mentioned plaintiff was and still is an employee of the Erie Lackawanna Railroad Company.

Seventh: On or about July 30, 1964, while plaintiff was working aboard a car float in the Hudson River, between the States of New York and New Jersey, he was caused to be hurt and injured by and because of defective braking equipment maintained aboard defendant's Car 28244, and because of the negligence of the defendant, and he thereby sustained severe and painful injuries.

Eighth: Said accident and the injuries resulting to plaintiff therefrom were solely the result of the negligence of defendant, with no negligence on the part of plaintiff contributing thereto.

Ninth: Defendant was negligent in that, on information and belief, it maintained on its Car 28244, defective braking equipment; in that it failed to properly repair and/or inspect said braking equipment; in that it delivered said car, or caused said car to be delivered, to the Erie-Lackawanna Railroad Company with braking equipment which was maintained and/or repaired in a defective condition; in that it failed to give notice or warning to plaintiff or to the Erie-Lackawanna Railroad Company, (plaintiff's employer) of the defective and dangerous condition of the braking equipment on said car, and in that it failed to take other necessary precautions to prevent the accident.

Tenth: By reason of the premises plaintiff was severely and seriously injured; suffered and will continue in the

future to suffer pain and injury; has become sick, sore, lame and disabled, and on information and belief will be permanently injured; has lost and will lose in the future sums of money which he otherwise would have earned; has been compelled to spend sums of money and incur liability for medical treatment and medicine; and, on information and belief, will incur such expenses in the future.

Eleventh: By reason of the premises, plaintiff has been damaged in the sum of $135,000.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $135,000.00, together with the costs and disbursements of this action.

BROMSEN & GAMMERMAN
Attorneys for Plaintiff
450 Seventh Avenue
New York, New York 10001

Defendant's Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Defendant by Carter, Ledyard & Milburn its attorneys answering the complaint herein alleges:

First: Denies each and every allegation contained in paragraphs Second and Third of the complaint except admits that at all of the times therein mentioned it maintained offices in the City, County and State of New York.

Second: Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph Sixth of the complaint.

Third: Upon information and belief denies each and every allegation contained in paragraphs Seventh, Eighth, Ninth, Tenth and Eleventh of the complaint.

WHEREFORE defendant demands judgment that the complaint be dismissed together with the costs and disbursements of this action.

Dated: New York, N. Y.
May 25, 1966

CARTER, LEDYARD & MILBURN

By /s/ J. P. ALLEE
A Member of the Firm
Attorneys for Defendant
Office & P. O. Address
2 Wall Street
New York, New York 10005

Defendant's and Third-Party Plaintiff's Complaint Against Third-Party Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

1. Plaintiff Theodore Benazet has filed against defendant Atlantic Coast Line Railroad Company a complaint, a copy of which is hereto attached as Exhibit "A".

2. At all of the times mentioned in said complaint, defendant and third-party plaintiff was the owner of car ACL 28244 referred to in said complaint in which it is claimed that said defendant and third-party plaintiff was negligent in that it maintained on said car defective braking equipment; failed to properly repair and/or inspect said braking equipment; delivered said car, or caused said car to be delivered to Erie Lackawanna Railroad Company with braking equipment which was maintained and/or repaired in a defective condition; failed to give notice or warning to plaintiff or to Erie Lackawanna Railroad Company (plaintiff's employer) of the defective and dangerous condition of the braking equipment in said car and that it failed to take other necessary precautions to prevent the accident which resulted in injury to said plaintiff on July 30, 1964.

3. Upon information and belief the last time prior to July 30, 1964 the said car ACL 28244 was in the possession of defendant and third-party plaintiff was on June 1, 1964.

Between that date and July 27, 1964, the date on which said car was delivered to Erie Lackawanna Railroad Company, it had been in the possession of and operated over the lines of approximately seven different railroads in different parts of the country.

4. That it was the duty of each and every railroad which moved said car over its line, including third-party defendant Erie Lackawanna Railroad Company, to make an inspection of the brakes and braking equipment on car ACL 28244 before accepting delivery of said car from a connecting carrier.

5. Upon information and belief the third-party defendant Erie Lackawanna Railroad Company between July 27, 1964 and July 30, 1964, while said car ACL 28244 was in its possession and under its control, did not make any inspection of the brakes or braking equipment on said car although it had been moved from the point where it received said car from the connecting carrier, on to Car Float 50 on the Hudson River at or near its North Yard, Jersey City, New Jersey.

6. That the failure of the third-party defendant Erie Lackawanna Railroad Company to inspect the brakes and braking equipment on car ACL 28244 after receiving it from the connecting carrier and prior to loading it on Car Float 50 on July 30, 1964 was the proximate cause of the injury sustained by plaintiff on that day.

WHEREFORE defendant and third-party plaintiff, Atlantic Coast Line Railroad Company, demands judgment against

third-party defendant, Erie Lackawanna Railroad Company, for all sums that may be adjudged against the defendant Atlantic Coast Line Railroad Company or, in the alternative, that the said defendant and third-party plaintiff be entitled to judgment against the third-party defendant for contribution as a joint tortfeasor for any sum that may be adjudged against defendant, Atlantic Coast Line Railroad Company, in favor of plaintiff, Theodore Benazet.

Dated: New York, N. Y.
December 16, 1968

CARTER, LEDYARD & MILBURN

By FRANCIS M. ELLIS
A Member of the Firm
Attorneys for Atlantic Coast Line Railroad Company, Third-Party Plaintiff

Third-Party Defendant's Answer to Third-Party Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Third party defendant, by its attorney, Lloyd W. Roberson, Esq., answers the third party complaint as follows:

First: Denies having any knowledge or information sufficient to form a belief as to each and every allegation contained in that paragraph designated "1" of the third party complaint.

Second: Denies having any knowledge or information sufficient to form a belief as to each and every allegation contained in that paragraph designated "2" of the third party complaint except admits that the claims of plaintiff alleged in paragraph "2" of the third party complaint are contained in the copy of the complaint annexed to the third party complaint served by the third party plaintiff on the third party defendant.

Third: Denies having any knowledge or information sufficient to form a belief as to each and every allegation contained in that paragraph designated "3" of the third party complaint.

Fourth: Denies having any knowledge or information sufficient to form a belief as to each and every allegation

contained in that paragraph designated "4" of the third party complaint and states that the allegations of paragraph "4" of the third party complaint call for conclusions of law, which the third party defendant respectfully refers to the court.

Fifth: Denies each and every allegation contained in that paragraph designated "5" of the third party complaint.

Sixth: Denies each and every allegation contained in that paragraph designated "6" of the third party complaint.

FIRST SEPARATE AND COMPLETE DEFENSE

If there was any incident or accident, injury or damages as alleged by plaintiff and third party plaintiff, such incident or accident, injury and damages were caused solely by the negligence of the plaintiff and third party plaintiff.

SECOND SEPARATE AND COMPLETE DEFENSE

The commencement of the action by plaintiff was commenced more than two (2) years after the occurrence of the incident complained of in the plaintiff's Statement of Claim, and plaintiff is barred from maintaining such action.

THIRD SEPARATE AND COMPLETE DEFENSE

If there was any incident or accident, injury or damages as alleged by plaintiff and third party defendant, such incident or accident, injury and damages were not caused by defendant but were caused solely by the acts and negligence

of the plaintiff and of the third party plaintiff and of persons and entities other than defendant and for whom defendant was not responsible.

First Separate and Partial Defense

If there was any incident or accident, injury or damages as alleged by plaintiff and third party plaintiff such incident or accident, injury and damages were contributed to by the negligence of the plaintiff and third party plaintiff.

Second Separate and Partial Defense

If there were any injuries or damages as alleged by plaintiff, plaintiff did not mitigate or attempt to mitigate his damages.

Third Separate and Partial Defense

If there was any incident or accident, injury or damages as alleged by plaintiff and third party plaintiff, such incident or accident, injury and damages were caused by the active acts and active negligence of the plaintiff and of persons and entities other than plaintiff including the defendant and third party plaintiff Atlantic Coast Line Railroad Company.

Wherefore, third party defendant, Erie Lackawanna Railway Company, successor by merger to Erie Lackawanna Railroad Company demands judgment dismissing the third party complaint together with costs and disbursements of this action.

Dated: New York, New York
February 27, 1969

/s/ LLOYD W. ROBERSON
Lloyd W. Roberson
Attorney for Third Party Defendant
Erie Lackawanna Railway Company
140 Cedar Street
New York, New York 10006
BArclay 7-2500

[To all attorneys of record]

Amended Answer of Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION.

Fourth: Upon information and belief that the said plaintiff did not exercise the proper degree of care for his own safety in that he failed to note the alleged rotted condition of the footboard on freight car ACL 28244 on July 30, 1964 while applying the brake on said car after it had been loaded on car float 50 on the Hudson River at or near North Yard of Erie Lackawanna Railroad Company, Jersey City, New Jersey, and said contributory negligence on his part was the proximate cause of the injuries sustained by him.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION.

Fifth: At all times mentioned in the complaint defendant was the owner of freight car ACL 28244.

Sixth: Upon information and belief, the last time prior to July 30, 1964 said car ACL 28244 was in the possession of defendant and third-party plaintiff was on June 4, 1964. Between that date and July 27, 1964, the date on which said car was delivered to Erie Lackawanna Railroad Com-

pany, it had been in the possession of and operated over the lines of approximately seven different railroads in different parts of the country.

Seventh: Upon information and belief, the Inter-Change Rules of Association of American Railroads, Operations and Maintenance Department, Mechanical Division, effective at all of the times mentioned in the complaint, provide as follows:

"Care of Foreign Freight Cars

"Rule 1. (a) Each railroad is responsible for the condition of all cars on its line, and must give to all equal care as to inspection and lubrication."

Eighth: Upon information and belief, it was the duty of each and every railroad which moved said car over its line, including third-party defendant Erie Lackawanna Railroad Company, to make an inspection of the brakes and braking equipment on car ACL 28244 before accepting delivery of said car from a connecting carrier.

Ninth: Upon information and belief, third-party defendant Erie Lackawanna Railroad Company between July 27, 1964 and July 30, 1964 while said car ACL 28244 was in its posssession and under its control did not make any inspection of the brakes or braking equipment on said car, although it had been moved from the point where it received said car from its connecting carrier on to car float 50 on the Hudson River at or near its North Yard, Jersey City, New Jersey.

Tenth: That the failure of the third-party defendant Erie Lackawanna Railroad Company to inspect the brakes and braking equipment on car ACL 28244 after receiving it from its connecting carrier and prior to loading it on car float 50 on July 30, 1964 was the proximate cause of the injury sustained by plaintiff on that day.

WHEREFORE, defendant demands judgment that the complaint be dismissed as to it or, in the alternative, that defendant and third-party plaintiff Atlantic Coast Line Railroad Company demands judgment against third-party defendant Erie Lackawanna Railroad Company for all sums that may be adjudged against defendant Atlantic Coast Line Railroad Company or that defendant and third-party plaintiff be entitled to judgment against the third-party defendant for contribution as a joint tort-feasor for any sum that may be adjudged against defendant Atlantic Coast Line Railroad Company in favor of plaintiff Theodore Benazet.

Dated: June 20, 1969
New York, N. Y.

CARTER, LEDYARD & MILBURN

By JAMES J. MENNIS
Attorneys for Atlantic Coast Line Railroad Company
Defendant and Third-Party Plaintiff

Excerpts From Transcript of Trial

GEORGE RIEDINGER—*Cross*

* * * * *

Q. Now, between the defective car and where Mr. Benazet was, how many railroad tracks were there? A. Well, the situation where these floats are, you got two tracks, one on the north side and one on the south side. The one on the north side, the center track [75] of the float branches off this track into the center. When they load a loaded float in this condition they always load the north side of the float first, and use the center track.

After they get the cars on the center track, they will make their cut, pull up, throw the switch and then come in on the outside track, and load that side.

Q. This car float was floating in the water, wasn't it? A. Yes, sir.

Q. And this was the water part of the New York bay? A. That's right.

Q. And just so that the jury is informed, the float bridge is really a type of float that is able to rise up and down with car tracks going up or over it so as to connect to the car floats, so as to take the railroad cars from the land to the float or from the float to the land, is that right? A. That is right. That's what I explained yesterday, due to the aprons, they regulate the aprons. The bridge operator regulates the aprons of the bridge according to the tides of the river. If it is a hightide he can raise the aprons up. If it is a low tide, he can lower the aprons. As a float is being pushed into the [76] bridge with the tug, the bridge operator operates the apron of the float bridge in order to make the connections.

* * * * *

[102] GUSTAV FALLER, called as a witness by the plaintiff, having been first duly sworn; testified as follows:

The Court: Mr. Witness, I didn't hear your name; please speak loudly so that we can all hear your testimony. Would you give me your name again?

The Witness: Gustav Faller.

[103] The Court: Thank you.

Direct Examination by Mr. Altier:

Q. I understand you are retired, is that correct? A. That is correct.

Q. What was your occupation before you retired? A. I was a railway car inspector.

Q. For what company were you employed, sir? A. New York Central Railroad.

Q. How long had you been employed by the New York Central Railroad? A. (No response.)

Q. When did you first go with them? A. 1927, May 10.

Q. After you were with them for a while did there come a time when you went with the Car Inspectors Service? A. Yes, sir.

Q. When you became a car inspector did you go through an apprenticeship and training? A. We were trained on the job.

Q. How long a period of time did that training take before you got fully qualified as a car inspector? A. Four years.

Q. After you became qualified as a car inspector did you act in that capacity for your company? [104] A. Yes, sir.

Q. Did there come a time subsequent to that when you became a supervisor of car inspectors? A. Yes, sir.

Q. When was that? A. That was 1949.

Q. And then, sir, in your capacity as a supervisor of inspectors, can you tell us how many inspectors would be under your jurisdiction or under your direct supervision from time to time? A. In the yards, when I was supervisor of yard forces, we had as high as 40 or 50 men, and on repair tracks supervision I had as high as 50 repair men.

Q. Would your function there, sir, be in a supervisory capacity? A. Yes, sir.

Would you be directly responsible for the work of these men? A. Yes, sir.

Q. Are you familiar, sir, with the standards of practice on the railroad lines on or about July 30, 1964? A. Yes, sir.

Q. Sir, I show you Plaintiff's Exhibits 2, 2A, 2B and 2C in evidence, and ask you, sir, whether or not [105] you have handled or seen or been responsible for cars of this type during your career? A. Yes, sir.

Q. How many such cars would come through your men, the men you supervise or through you during your career, or let's say during a year's period or a month's period, whichever might be easier? A. It takes a lot of arithmetic.

The Court: On an average, take any period you wish.

A. On a day, in supervising inspectors in one particular yard we run out about 300, 400 cars a day.

The Court: All right. Next question.

Q. Well, sir, are you familiar with the methods that are employed at, or about that time of inspecting the cars by an owning line? A. Yes, sir.

Q. Are you also familiar with the method and the accepted standards of investigation and inspection for a passing on line, or a foreign line, a line foreign to the car? A. Yes, sir.

Q. In the course of your work for the railroad, have you become familiar with particular stress points on [106] railroad cars of that sort? A. Yes, sir.

Q. Are you familiar with the nature of the metals as it is subjected to use on railroad lines over a period of time? A. Yes, sir.

Q. Are you familiar with the way that the conditions and the periods of time within which the conditions of wood, exposed wood on railroad trains changes? A. Yes, sir.

Q. Now, sir, you have been here since the beginning of the trial, is that correct? A. That is correct.

Q. You heard Mr. Riedinger testify and all of his testimony, is that correct? A. Yes, sir.

Q. You also heard Mr. Roberts testify and read the exhibit that was in evidence here, Plaintiff's Exhibit 1 in evidence, the repair card, is that correct? A. Yes, sir.

Q. And you have also reviewed those photographs, is that correct? A. (No response.)

Q. You have seen those photographs? [107] A. Yes.

The Court: Please, always, for the sake of the record, give the numbers even though it is repetitious.

Mr. Altier: All numbered 2, 2A, B and C.

The Court: All right.

Q. Now, I am going to ask you, sir, to assume all of the facts that were testified to concerning the footboard and I am just addressing myself to the footboard at this time. I want you to assume the testimony as was evinced by Mr. Roberts—

> The Court: I have great respect for counsel on all sides, but once in a while I must interrupt. I know what you are trying to say, but I would like to have you actually incorporate the factors that you wish to confront the witness with rather than have him tell us his estimate of their testimony.
>
> Mr. Altier: Fine, your Honor.

Q. Mr. Faller, addressing ourselves to the footboard, I want you to assume that this footboard was owned by the Atlantic Coast Line and was attached at the—at one of the ends—I don't remember which it was—of the car where the break was. Assume that that car had been in the possession of the Atlantic Coast Line on the dates as I indicated in Plaintiff's Exhibit 4, to wit—

> [108] The Court: I hope you will forgive my interfering but this is a very important question, extremely important, and we have got to know exactly what factors the witness is considering before he gives his answer.

Q. To wit, on September 4 to September 8, 1962, from 11-16-62 to 11-22-62, from 11-24 to 12-5-62, from 12-17-62 to 12-20-62, and then at the end of 1963, came into the ACL possession for a month, a little over a month, from Novem-

ber 11, 1963, to December 13, 1963, and then it came into the ACL's possession on 6-1-64,—I am sorry, I skipped.

Then it came into their possession for two months in the beginning of 1964, namely from January 10, 1964, until March 10, 1964.

And then again into the owner line, this railroad car returned on May 9, 1964, and May 10, 1964.

And then again this owned vehicle, freight car, came into the possession of the Atlantic Coast Line on June 1, 1964, to June 4, 1964.

I want you to assume that on July 30, less than two months later, that car went through seven other lines and then came into the possession of the Erie Lackawanna Railroad, and that on that day, at about noon, Ted Benazet climbed up a ladder, while applying that hand brake the [109] footboard gave away out from underneath his right leg, his weight went back upon the hand brake, he pulled—when he pulled against the hand brake as his weight went back the hand brake assembly came down and Ted Benazet went down to the deck of a float whereon that car was stationary at the time of that accident.

I want you to assume that within a very brief period of time thereafter the witness, Mr. Riedinger, came down to the scene of that accident, looked up, saw that brake assembly dangling over the footboard, that on that same day, or within a 24-hour period of time, on a nice day, the photographs, 2, 2A, 2B and 2C were taken, as you see them there; I want you to assume that Roberts did a close inspection of the footboard as shown in those photographs, that that inspection demonstrated one-quarter inches of rot into the top of the board which board was an inch and a quarter in

thickness; in other words, that Roberts observed 20 per cent rot depth of the width of that board; I want you to further assume that Riedinger also investigated, he didn't recall, however, the condition of the footboard other than to say it was broken, but he did observe minutely the condition of the fissure and the broken ends of the brake bracket.

He described them, that on each of the brake [110] brackets there were the remnants of a one-half inch spot, electric weld; and at that point, where you observe the break, the metal was brighter in color than the rest of the metal of the bracket which, at the point of the break, was rusted.

The Court: The rest of the weld of the bracket was such.

Mr. Altier: Was such. And also the 2½ additional inches of the brake were such.

Q. (continuing) And this long question I want answered yes or no. Assuming all of those facts, can you, with a reasonable degree of professional certainty, of the certainty gathered through your years of experience, can you, with a reasonable degree of certainty, tell us what the age of that rotted condition on the footboard was?

Mr. Mennis: At this point, your Honor, I would like to object, first to the fact that although this car was owned by the Atlantic Coast Line Railroad Company, there has been no evidence that that wooden footboard was on that car during all of the

period mentioned; and on the further ground that I don't think he has a sufficient basis, as far as those brackets are concerned, on which to base an opinion.

The Court: Objection overruled.

[111] Mr. Roberson: Your Honor, I object to the part that makes an assumption that Mr. Roberts made a close inspection, and my recollection is that Mr. Roberts gave testimony he didn't make a close inspection, that he saw that the board was broken and it was rotted, and that he didn't therefore, proceed with a closer inspection.

Mr. Altier: If I may, your Honor, amend my question.

Q. Mr. Faller, change that assumption and eliminate from it, so that we don't—just eliminate from that my words "close inspection"—just that he inspected it and found it rotted to a depth, and everything else is the same, all right?

The Court: Now have you got all those factors in your mind, Mr. Witness?

The Witness: Yes.

The Court: Do you remember the question?

The Witness: I remember the question.

The Court: What is your answer, yes or no?

The Witness: Yes, I can determine but I will have—

The Court: The answer is yes?

The Witness: Yes.

The Court: Next question.

[112] Q. Sir, can you tell us whether the rotting and deterioration began, in your opinion, on the footboard? A. May I examine this photo?

The Court: Certainly, you may examine anything you wish.

(Witness examines photo.)

The Witness: I am ready.

Q. How long sir? A. At least two years.
Q. On what do you base that opinion?

The Court: Now you may answer more than yes or no, of course. Now the jury wants to know, and so does the job, why do you say two years? Take your time and explain it to us.

The Witness: First I'm taking into consideration what I see in the photo, that the leading edge of the footboard is weatherbeaten. This don't happen overnight or over a short period of time.

Two: At the split bolts—

The Court: At the what?

The Witness: Split bolts. Should I explain that to you?

The Court: Yes.

The Witness: By law of Congress it has been [113] established as to the size and thickness of the width of these bolts, and because it is a safety appliance, being wood, the man depends upon stepping upon it and it is secured by bolts. It could split at these bolt holes, so through the facing edge of the

board, for example, if this was the board, we place two split bolts through the entire thing to lock that as an integral part, so it will not split, and these are split boards.

Now, here at the split bolts that is evidence of rusting and rotting.

Q. Which photo are you referring to, sir? A. This is 2.
Q. Would you take a—

The Court: May I ask your indulgence?

Mr. Altier: Surely.

The Court: Let him finish, and then you fill in any gaps or anything you wish, but he is now building up and he is coming to a crescendo here.

A. Now, the left-hand split bolt, it indicates there that there is rusting and decay. Now rust builds on these bolts and expands. Rust will always expand, and it has split this board from the split bolt to the right side to the support bracket.

Now, at the failure on the right-hand side—

[114] Q. I am sorry, I missed that word. A. At the failure of the board itself on the righthand side there appears to be the same type of a crack which originates on the split bolt, and the split bolt on this side is inside of the support bracket. There is two support brackets by law, and two bolts support this footboard. The split bolt on the left-hand corner is outside of the bracket. The split bolt on the right-hand side is inside the bracket. The failure here shows definitely that it started at the split bolt, the point where corrosion and rust sets in, and broke off, and is still hanging there.

There are two holes which are decay or rot holes in that trailing edge to the right of the bracket, and this is what I base my opinion on inasmuch as it takes several years for this condition to exist, and is visible, inasmuch as those cracks are visible and those two holes in the end of the footboard that is broken.

Q. Sir, the quarter inch depth of decay, is that relevant to your evaluation or your estimation of time? A. It is not visible but what is visible is the split, where it starts, and the decay holes in here.

Q. No, sir. Listen to my question now. I said is the fact of the—that was testified—namely the quarter inch depth of rot at the top of the board, is [115] that a factor that you use in estimating the time of this decay to be two years? A. Yes, sir.

Q. Now, you have stated that you are familiar with the procedure of a receiving owning line in receiving a car of this kind, correct? A. (Witness nods.)

Q. You must answer. A. Yes, sir.

Q. Would you describe the examination that is the accepted standard examination of a receiving line during 1962-63 and 1964, what kind of examination do they conduct, an inspection? It is standard to conduct, by an owning line, concerning the brake, footboard and brake assembly?

The Court: I am sorry, but you started out with the past tense and then you wound up in the present tense.

Mr. Altier: I will rephrase the question.

Q. Would you state to the Court and the jury what the accepted test consisted of during 1962, 1963, and 1964, relating, said inspection being made by a receiving, owning

line, said inspection being made to the brake assembly and brake footboard? [116] A. (No response.)

Q. How do they do it? The accepted method. A. May I ask a question?

The Court: You certainly may if you think it will help you to understand the question.

The Witness: Yes, sir. We have what is known as an interchange, the cars are interchanged from one railroad to another.

Mr. Roberson: Your Honor, the expression "we" I am not quite certain what he is referring to.

The Witness: In the railroad industry.

The Court: Yes.

The Witness: The expression in the railroad industry, as to the accepting cars of one railroad to another is an interchange.

If you are trying to ask me what our practices were in accepting our own cars back in interchange, what the inspection consisted of, is this what you want to know?

Q. That is exactly what I want to know. A. Well, primarily all the inspections are identical. When we hit our own home cars we look for cardable damage, cardable damages is an expression where someone is responsible for damages to your equipment that has not been repaired or reported.

[117] We look for these defects to protect our own company, and we also look for normal excessive wear that might, in the near future, cause our car to be cut out. We like to send them to our own shops and repair them. The reason for this is on repair tracks we open the doors, the cars are empty, we examine the interior, sometimes we re-

pair the flooring, the side lining to keep the cars in good condition.

There is a type of repair and maintenance that is not normally done on other railroads, but all the inspections are the same.

Now, we hit cars with wooden footboards, or any exposing wood, very few running boards today, the wooden boards on the side, the destination cardboards which are on the side doors of the cars, we repair them and replace them, especially when there is rot and decay and especially on the footboards because this is a safety appliance and when you work on a railroad, whether the man is a track man or a supervisor, you are one big family and we don't normally quit our jobs and move around. We stay on the job until our days are done and you get to know all these men. We would feel terrible if we had missed something and a man is injured anywhere.

But the United States had passed laws protecting [118] men, and make this mandatory, that these boards have got to be in first class condition.

Q. Mr. Faller, when you inspected, and you were the receiving line, when you are inspecting the footboard, what is the accepted procedure, in 1963, 1964? A. When it shows decay—

The Court: No, no. What would an inspector do in those years when he inspected such a car?

A. When you inspect such a car, you see decay as this, you get up on the board and examine it closely. Now, that is one of the few times when you really climb a ladder, because normally the car inspector is on the ground.

The Court: Would they climb a ladder?
The Witness: Yes, I would.

The Court: Wait a minute. That is the point. Would you climb the ladder even though you had no reason to believe there was anything wrong with it?

The Witness: Oh, no.

The Court: Well, that is what he is asking you.

The Witness: That is what I said. If I see a board in this condition, I wouldn't climb the ladder. I could see it from here. I could see it from the ground. [119] It is a small photo. This is visible from the ground. You are about 10 feet away from it when you see it.

The Court: You better straighten it out.

Mr. Altier: Yes.

Q. Mr. Faller, when you are on a receiving line and you are investigating and you are a car inspector on the receiving line, and you are now going to look at the safety appliances on that car, do you look at it from down here or do you climb the ladder and look right at it? A. If I am making a safety appliance check I will climb the ladder.

Q. Is that standard practice, to climb that ladder when you are on a receiving line? When you are a receiving owner—maybe I am using the wrong phrase—and you are going to look at the brake, isn't it standard practice— A. Yes, you would climb the ladder to look at the brake.

Q. Is it also standard practice to climb the ladder and look at the footboard? A. When you are up there you will.

The Court: I am afraid that the witness has not made himself too clear, at least to me.

Mr. Altier: I will try to straighten it out.

[120] *By the Court:*

Q. What we want you to tell us is what was the regular inspection in those years of a freight car which was re-

ceived by a line from another line? That's the first question. What would he do if his attention wasn't called to anything in particular? Here comes a railroad freight car, what does he do when he inspects it? A. He makes—

Q. In 1963 and 1964. A. He makes what we consider a normal—

Mr. Roberson: Your Honor, just an objection by way of clarification, because—

The Court: Well, you straighten it out later. I want his answer to this question now.

Mr. Roberson: I am not sure whether he is talking about receiving it in the regular course—

The Court: Just a moment. I have got his mind concentrated I think on what we are after, and that is to find out what would be the ordinary inspection by a receiving line of a car back in 1963-1964. Just what was the routine, that's all I want to know.

The Witness: We would make a physical inspection of the exterior of the car.

Q. What would it be? How did you go about it? [121] A. Come up to the end of the car, examine the ladders, you would look up.

Q. Yes, sir. A. There is an end ladder. If you are on the "B" end of the car which indicates that that is the brake end of the car, you would give that a visual examination, you would examine the extending and the running board. You look for any defects that might be indicated from the ground level.

Q. Right. A. You walk down the side of the car, observe the side ladder, you observe the doors. Before you leave the side ladders you bend down and examine the under gearing, the couplers, the release levers, etc.

You would walk up to the door of the car, make sure that it was locked and sealed or wired.

And you would continue on and make the same identical inspection on the other end of the car.

The Court: Very well. Now you can ask any questions along those lines you want where a receiving car owner and all the rest of it are involved.

By Mr. Altier:

Q. Would, in your opinion, the decayed condition be apparent or be noticeable by that routine inspection [122] conducted some two months prior to this accident? A. Yes, sir.

Q. What would be the accepted practice in seeing a board of that size from the ground, what would have been the accepted practice in the industry in early June 1964, what should that inspector have done following ordinary practice? A. Card the car, put a card on the side of the car marked "bad order," notify the yard master to have the car switched out for movement to repair track. We would indicate on a car what our exceptions were.

Q. In order to do that would you climb the ladder and look at it in detail? A. Well, when we notice this condition, yes.

Q. And is that standard practice when you notice that condition, is it standard practice in the industry to climb the ladder and look at the condition? A. Yes.

The Court: You said "if."

Q. Was it in 1962, 1963 and 1964 the standard practice when you noticed such a condition from the ground to climb the ladder and take a good look at it? A. Yes.

The Court: Don't forget, we have gone to the [123] moon since that year, right? You don't know what the present method is, whether they have the same or different equipment for inspection. Very well.

Q. Are there, sir, on the brake assembly, certain stress points? A. Yes, sir.

Q. And would you tell the Court and the jury what those stress points are in the metal on that brake assembly? A. At the bends.

Q. Can you observe there where that brake assembly broke, the brackets broke, from the photographs? A. Yes, sir.

Q. And where did the break occur?

The Court: Now, you are looking at which exhibit?

The Witness: I am looking at 2B, your Honor.

The Court: That's right. 2B.

A. 2B is a lot clearer.

The break occurred at the first offset from where the bracket was secured to the car.

Q. Did it break at the bends? A. At the offset.

Q. Why are these called stress points? A. Well, stress points or fatigue points, you normally find fatigue cracks in this area.

[124] The Court: No, no, that still doesn't answer it. I am sorry. Why is it called stress point? Is it that there is greater stress on that?

The Witness: Yes.

The Court: Wait a minute. No one can interrupt the Judge. He has certain prerogatives, that is all I get really outside of the pleasure of the job. I am allowed to tell jokes even though they are no

good, and everybody is expected to laugh, you know. Now take it easy, please, because I am trying to follow you and I think if I follow you the jurors surely will.

By the Court:

Q. When you say stress point on a bracket, for instance, do you mean that that particular point is exerting the greatest amount of stress on that bracket? A. Yes, sir. Shall I explain that?

Q. Please do. A. This particular bracket in the trade is known as a single offset bracket. It comes down flush to the wall of the car, to the end of the car, it has one offset out and then drops down.

That bracket is supported to the car by two rivets, both sides.

The bracket assembly is bolted or riveted to [125] these two brackets which are hanging free because they are now not secured on the bottom. There is motion there.

Now, when the hand brake is wound up, this is a gear ratio brake. It is about a 5 to 1 on a gear ratio. That means if a man winds that brake up and he is applying 200 pounds pressure he is applying over a thousand pounds of pressure to this first offset, because that whole bracket pulls down. He is tightening up the brakes to keep this huge car from moving. Therefore, something has got to give, and when it stops giving then the brakes are completely set. This is what we call taking the strain on the metal, and then you wind them up tight.

And this point, coming down, is where all the fatigue cracks show, and on the exposed—where the inspector can see it.

The Court: That you made simple and clear. Very well.

By Mr. Altier:

Q. Now, the fatigue points or cracks, do they progress, in your experience, at a usual rate over a period of time? Can you estimate at what rate these— A. They grow.

Q. In your experience, are you familiar with the rate at which they grow? [126] A. It takes several years for them to become in a dangerous position, yes.

Q. How fast do they grow? A. Well, the fatigue crack starts—

Q. How fast do they grow? A. It starts at the corner of the bend and progresses across—about a half inch a year, to a point when the wear, the stress is accelerated after you get to a certain part because you are losing the strength of the metal.

The Court: In other words, at that point—

The Witness: It begins about a half inch a year, and when it gets up to three-quarters of an inch you begin your accelerating because you have lost the strength of the metal, and this is a very critical point of inspection.

The Court: And when it begins to manifest such an invasion, I presume that it then becomes less capable of resisting to the stress?

The Witness: Correct.

The Court: All right.

Q. Now, how long prior to this breaking away that we described in our hypothetical question, in your opinion, was this spotweld made? [127] A. Well, I can't see the spotweld but the spotweld was described as a half inch long, and this metal being 3 to 3½ inches wide, I'd say that from the spotweld, 50 per cent of the metal, take a year and a half

before we came up to the critical point, two years before the fracture was completed.

Q. Is it, Mr. Faller, the accepted standard practice when receiving—

The Court: Please counsel, is it, is it?

Q. In 1962 through 1964 was it the accepted practice, when receiving a car, one's own car, to particularly examine the safety appliances on that car? A. To examine the safety appliances?

Q. The safety appliances, do you examine the safety appliances? A. Yes.

Q. As a matter of fact, the ICC makes you examine them, doesn't it? A. On all cars, yes, sir.

Q. It is Federal law that says you must examine the braking system, the safety appliances, one of which is a hand brake system, isn't that correct? A. Yes, sir.

Q. So it is your duty, you must do this according [128] to Federal law, examine in detail the system, isn't that correct? A. Yes, sir.

The Court: The only one who is allowed to raise his voice is the Judge. And is that true in 1963 and 1964?

The Witness: It has always been true.

The Court: All I asked you was, was that true in 1963 and 1964?

The Witness: Yes, sir.

The Court: And the safety devices include what?

The Witness: Hand brakes, footboard, and the hand brakes or any other securements of the safety device itself.

The Court: Thank you.

Q. In your opinion, sir, would the spotweld and the fissure have been visible upon the inspection made by the receiving line on June 1, 1964? A. Would you say that again, I didn't get it. I'm sorry.

Q. In your opinion, sir, would, upon an inspection of the safety appliances by the owning line, on June 1, 1964, when it received this car into its possession, would it have disclosed the spotweld in the fissure? [129] A. Yes, sir.

Q. What was the accepted practice in June of 1964 if you discovered upon inspection such a condition, namely the spotweld and the fissure? A. (No response.)

Q. What would be the accepted practice? A. Send the car to repair track for repairs.

Q. Would it be acceptable to send that car in that condition back into interstate commerce? A. (No response.)

Q. Back onto the lines again? A. No.

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THEODORE BENAZET—*Direct*

[154] The Court: If I may interrupt you, counsel, just how did you get onto the deck of the float? See, now, we are supposed to understand it and you may be surprised at that question, but how did you actually find yourself down on the deck of the float?

The Witness: I walked down, your Honor. I walked down to the float as we were loading the cars.

Mr. Altier: I think the witness misunderstood.

Q. The Judge was inquiring how did you get—after you felt the footboard go out underneath your foot—incidentally, what foot was it that went out? A. The right foot.

The Court: See, if you don't mind, counsel, you have got to give it to us step by step, instant by instant. You had your foot on the—now you go on, I don't want to lead you. Just go on and repeat it exactly, give it to us in detail. Then what happened to your body, the movements of your body, how your body went through the air. Where did it go, on the side, how did it get down [155] there? Do you understand what I mean?

Q. You can demonstrate if you feel easier to show us with your hands or stand and tell the jury how it happened.

The Court: All right.

A. Well, I was standing on the platform and I was exerting pressure on the brake like this, using my back and knees, too, and as I was putting on as tight as it would go, all of a sudden I felt the corner of this platform give way and as it gave way and I went back the gear box went off the car and I went back in the direction like that, down on the float. Then I felt myself flying through the air and then the next time I was out and I remembered I looked up, I was laying on the floor of the float and I looked up and at about a 45-degree angle like that I could see the gear box had come off the car and fallen over the brake platform, and the corner of the brake platform was also broke off.

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ANSWERS OF DEFENDANT TO PLAINTIFF'S INTERROGATORIES

[298] Mr. Altier: In answer to interrogatory No. 2 on the sheet I read either yesterday or the day before, which was propounded by my partner, Ira Gammerman, on May 18, 1966, question 2 reads as follows:

"State what repairs were done on defendant's car ACL28244 from the 1st day of January 1961 through July 30, 1964, indicating the date and place of each repair, the nature of each repair and the name of the railroad making said repair."

In answer to that question on July 6, 1966, through an officer of the defendant Atlantic Coast Line, they answered interrogatory 2 as follows:

"Interrogatory No. 2: The following repairs were performed on car ACL28244 by Atlantic Coast Line Railroad Company on the dates and places shown below during the period February 28, 1962 through July 30, 1964.

"1. On February 28, 1962 at South Rocky Mountain, North Carolina, installed at the A and B ends of car No. two sheets of three-quarter inch plywood; on the [299] right and left sides three new sheets of three-eighth inch plywood applied. One route cardboard applied at location B end left side. Right and left doors straightened on cars.

"2. At Waycross, Georgia, on March 27th, 1962, repacked journal boxes.

"3. At Rocky Mountain, North Carolina on November 18, 1962, made in date test of air brakes in accordance with the Power Brake Law of 1958, paragraph 132.17(2)(1) filed in accordance with item 1200 of AAR Interchange Rule 101, Section B, account old date 3-27-62, WPAC.

"Brake shoes or brake shoe keys applied on right side No. 2 location and left side No. 3 location."

The repair card is not clear as to which was applied.

"Door handle straightened on left side.

"4. At Waycross, Georgia, on November 13, 1963, one pair of 33-inch multiple-wear steel wheels numbered 105 and 308 were applied at location R and L-1, removed multiple wear steel wheels numbered 46 and 5. Roller bearings numbered 53E847 and 53F82 were removed and roller bearings No. 53F47 and 58E803 were applied. Right side No. 1 location applied [300] one new brake shoe. Left side No. 3 location applied one new journal box bolt sleeve. Made in date test of air brakes. Car stenciled with old in date test dates and Southern Rail 3 14 63 and N I & NP 8/23/63"—

The Court: What do you think the jury is getting out of that? What's your point?

Mr. Altier: That these are the only repairs that they—

The Court: All right. Ask your adversary whether or not they will concede such and such repairs in such and such a way were made; that is all. Isn't that so?

Mr. Altier: Yes, sir.

Will you concede these repairs made as outlined in interrogatory No. 2 were the only repairs of which you have a record during this period of time made by the Atlantic Coast Line?

Mr. Mennis: Yes. But then there are some other repairs there that were made by other roads which are listed in those interrogatories?

The Court: Yes, but do they relate to the area of the car with which we are concerned, is all I want to know.

Mr. Mennis: They relate to the car itself, but not to the brake.

[301] The Court: Therefore, is there any purpose in it? I may not get all these points, you know. You are here to point out something to me and help me understand it. Do we need any of this, is all I am asking, other than the area with which we are concerned?

Mr. Altier: Yes, your Honor, I am afraid to say it—

The Court: Explain. Don't be afraid to say it.

Mr. Altier: Your Honor will recall the difficulty I had concerning the witness Mr.—the expert witness, Mr.—

The Court: He was brief. There is no testimony here that's been difficult. Did you ever have a real difficult witness?

Mr. Altier: I had one area of inspection that I wanted to clear up.

The Court: The kind of witness who says, "Who are you?" and "I'm not supposed to be listening—answering all this," and, you know, that kind of stuff, and, "I won't give it to you," and all that. That is a tough witness.

Mr. Altier: Right, okay. My point is, when a car hits a repair track, I don't care what the condition is, there is a certain kind of inspection that has to be done. So the relevant area here is not only is there a [302] type of inspection that is done when a car passes into interchange, not only is there another kind of inspection done when an owning line receives it, but there is, in addition to that, another kind of inspection which is performed when a car hits that repair track.

And what I am doing here is laying the foundation that this car hit the repair track; I don't care what it was. Once it hit the repair track and the ACL Line, there is a certain obligation of inspection. And that is the purpose of putting this in.

The Court: All right. Proceed in your fashion, except you will do so after lunch at 2:15.

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Mr. Altier: May I proceed, your Honor?

The Court: Please.

Mr. Altier: Your Honor, continuing to read the answer to Interrogatory 2, the record indicates—and I believe my opponent will stipulate that it indicates—that in addition to the times it was on the repair track of Defendant ACL, it was also on the repair track of Northern Pacific on August 23, 1963, and the Staten Island Rapid Transit Railway in November of 1962. At neither of those repairs was it worked on for the conditions alleged to be wrong in this case.

The Court: Very well.

Mr. Altier: In addition, your Honor—is that so?

Mr. Mennis: That is correct.

The Court: Thank you.

Mr. Roberson: Mr. Altier, can you hear the last phraseology?

The Court: Surely. Mr. Court Reporter, would you read it? Or would you want to show to counsel your last comments after he got through reading from the interrogatory.

Mr. Roberson: With reference to what is stipu-
[304] lated.

(Record read.)

Mr. Roberson: Well, I can't concede the least part because I am not clear of what the wording "it" and thereafter is saying.

The Court: Very well.

Mr. Roberson: Perhaps it can be restated or rephrased, but I am not sure the way it was stated I follow that.

Mr. Altier: The work that is done—I am sure you have a copy of this—other than at ACL Lines didn't involve the hand brake assembly or the footboard of the car in question.

The Court: Is that all right?

Mr. Roberson: That is all right, your Honor.

The Court: Fine. Thank you, Mr. Wolf.

Mr. Altier: Interrogatories propounded by me, dated June 1, 1967, are as follows:

"Interrogatory 5: State what records, if any, are kept by defendant concerning repairs made on Defendant's car ACL 28244 by railroads other than defendant."

Answer to interrogatory submitted by an officer, August 2, 1967, is as follows:

"AAR billing repair cards received from foreign [305] railroads are retained on file for a period of three years. Defendant does not have a billing repair card for car ACL 28244 during the period of three years prior to the date of the accident."

The next question is, and all the rest of the questions are propounded at the same time, as I originally indicated, and are answered at the same time:

"Interrogatory 8. State with particularity the invoice procedure of defendants concerning repairs

made by leasing railroads pertaining to defendant's car ACL 28244."

Answer to Interrogatory 8: "AAR billing repair cards are prepared for each car repaired stating the repairs made and reasons therefor in such detail as required by the AAR interchange rules and charges are assessed as provided by this code of rules. All billing repair cards covering repairs to Atlantic Coast Line Railroad cars for the month are consolidated into one monthly bill by listing on the bill only the cost of each car repaired which is submitted to us for payment with the original billing repair cards attached. Bill is audited in the accounting department and if found correct is approved for payment by draft which is drawn 30 days after the date of the bill, unless the bill is returned to the billing road prior to expiration of 30 days. We have no record of returning any Erie [306] Lackawanna car repair bill during the past three years. Approved bills became a part of a voucher record to be retained as required by Interstate Commerce Commission. Billing repair cards are detached and filed as per No. 5 above."

Now Interrogatory No. 9:

"State the date when defendant first obtained ownership of its car ACL 28244."

Answer to 9: "Defendant obtained ownership of car ACL 28244 in September 1940 as a rebuilt car."

Interrogatory 10: "State whether said car was inspected upon a regular basis. If it was so inspected, state the dates of inspection prior to plaintiffs' accident."

Answer to Interrogatory 10: "Yes. No reports available."

Interrogatory 11: "State in detail defendant's procedure for the inspect of car ACL 28244."

Answer to Interrogatory 11: "Can not answer as presently phrased."

Interrogatory 12: "State whether defendant inspected the aforesaid car when it was returned from the leasing railroads prior to plaintiff's injury."

Answer to Interrogatory 12: "Yes."

Interrogatory 13: "State whether there was [307] any other inspection made of the particular car, ACL 28244, before July 30, 1964."

Answer to Interrogatory 13: "Yes."

Interrogatory 14: "State whether there are inspection reports in existence pertaining to inspection of said car prior to July 30, 1964. With regard thereto state (a), the number of such inspections; (b), the dates of such inspection reports; (c), the location of said inspection reports; (d), the custodian of said inspection reports; (e), the contents of said inspection reports; (f), the name of the inspector or inspectors upon whose examination each report is based.

Answer to Question 14: "The only inspection reports of which defendant has knowledge are those referred to in defendant's answer to interrogatory No. 2, under date of July 6, 1966.

"Subsequent to that date the following report of repairs to ACL 28244, dated July 28, 1966 was received from W. G. Carlson, chief mechanic, officer

of Erie Lackawanna Railroad Company: 'The following repairs were made to this car on August 1, 1964, after the accident: Two new hand brake brackets applied account broken. Four securement bolts 5/8 inch and 1/2 inch applied account damaged by removal. Four new hand brakes bracket bolts applied 5/8 [308] x 2 inch account damage by removal. One new hand brake step applied account wood removed was decayed and broken. Four securement bolts 1/2 x 1 1/2 applied account damaged by removal.'

"In addition to the above records we have on file in this office car inspector's form 34 for November 21, 1962; December 4, 1962, and June 3, 1964, covering inspection of trains in which subject car was moving. While these forms are not inspection records of the individual cars they cover inspection and test of the entire train. These forms are signed by the car inspectors as shown below: N. K. Cox, William Flowers, J. W. Quinn, G. W. Alreid, deceased."

Interrogatory 18: "Has defendant received any invoice, notice, inspection report or made any payment to a leasing railroad for a welding repair made to the Ajax Brake assembly on defendants car ACL 28244?"

Answer to Interrogatory 18:

"We can not find any record or invoice, notice, inspection report or any payment to a leasing railroad for a welding repair made to Ajax Brake Assembly of our car, ACL 28244."

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[374] The Court: Let the record show that we had a conference in the robing room after the jury was excused yesterday afternoon. And I should say it lasted approximately 20 minutes, a half hour.

We met this morning to resume the conference at a quarter of ten. What is the conference about, what necessitated it?

In the first place, it must be recognized this action is predicated on common law tort. And Atlantic came forward and said, in effect, that common law tort is applicable and that if there was any contributory negligence on the part of the plaintiff, he would have to show himself absolutely free, therefore, in order to sustain his cause of action.

Requests to charge were submitted to the Court, all of which were consistent with the theory permeat-
[375] ing, in fact, saturating the entire litigation. There never was any motion from the time this case was instituted which took any opposition with regard to the cause of action being one in common law tort.

Suddenly, and without any prior notice—and surely the Court accepts counsel's explanation—Mr. Roberson, the attorney for Erie, yesterday submitted an additional request to charge. He came upon this thought and he was duty-bound to apprise us of it.

What is it that he wants? He wants us to declare that this is a maritime cause of action, certainly with respect to the claim over against him, in which event, there is no claim over. And he asks

to be allowed to step out of the case; his client should be allowed to walk home.

This despite the fact that counsel for Erie has labored hard and meticulously in cross-examination of the plaintiff's witnesses. I would say that certainly it is up to the jury, but I would say that the record would indicate that here and there he chipped away some of the effectiveness of the testimony adduced on behalf of the plaintiff, all to the benefit of Atlantic.

He had, in other words, a full opportunity to swing without hindrance at the plaintiff's cause of action. In fact, the full impact of his new request to charge, to wit, [376] the one dealing with the maritime cause of action, maritime claim, came after or just about the time that plaintiff's case was in.

Nevertheless, and without in any way holding Mr. Roberson to account, I think he did what he was duty-bound to do. The impact on all of us was definite—we couldn't brush it aside, and that goes for plaintiff as well as for Atlantic—counsel were taken aback by it, and so was the Court.

It is very easy for a Judge to say, "You can't have your cake and eat it. You came in on a common law tort, Erie, and you didn't do anything until it was too late."

That is easy to say, but actually if counsel for Erie is right, then we really have no justification to proceed in common law tort. This is not a matter of discretion; this is a matter of right. Is there jurisdiction or isn't there? It is as simple as that.

And, so, after a conference with counsel, and after reflection, and bearing in mind that none of

us are too certain as to whether or not the course we are about to announce is the best under all the circumstances—in other words, we are not as sure of it as we were when we started the trial dealing with the cause of action in common law tort—we have resolved the following: [377]

1. That, in essence, the substance of the cause of action of the claim and the defense by both Erie and Atlantic, or Atlantic as well as Erie, are in the record. Everything dealing with negligence, if any negligence there is, is in the record. Everything dealing with contributory negligence, if contributory negligence existed is before us.

What I am trying to say is that in, effect, we have the canvas and all we are trying to do is fit that canvas into the proper frame.

It is quite evident, of course, that in common law tort the burden of proving him free from contributory negligence is a burden on the plaintiff.

It is equally true that under maritime law the burden of proving contributory negligence is on the defendant. And then you have the comparative negligence rule.

So that we are agreed that the only difference of any significance at all between maritime and common law tort concerns itself with contributory negligence. And I am talking, of course, about the claim by the plaintiff as against Atlantic.

We might as well rush in and dispose of the proposition that with regard to the claim over, under the maritime law, if it is a maritime law, then there is no [378] claim over.

• • • • •

[379] If they find it so, then we propose to charge them with regard to what comparative negligence is, what that means.

And so, in essence, then, with regard to the claim of the plaintiff against Atlantic, the jury will have a guide before it and that guide will read something like this: "Was Atlantic negligent?

"Yes, no.

"Was the plaintiff free from contributory negligence? "Yes, no.

"Considering what you were told with regard to the other side of the coin with respect to contributory negligence, assuming that the burden is on the defendant, Atlantic, to prove contributory negligence, did it sustain such a burden by a preponderance of the credible testimony?

"Yes, no.

"If yes, then to what degree, what percentage of the total fault is attributable to the plaintiff? But put down a percentage.

"Now, ladies and gentlemen, the next point, over and above all that you have disclosed above, what do you, as the fact finders, find with respect to damages? What is the total damage sustained by the plaintiff?"

And then, of course, we propose, with counsel [380] being given additional time, to make motions addressed to the findings of the jury. And if the Court should be convinced that maritime law really is applicable and therefore, the contributory negligence test under maritime law is applicable, we can take the findings of the jury as pronounced by them and do justice in the light of their findings.

Now, with regard to the claimover, we are going forward, as already suggested, with the burden being on Atlantic to show negligence in inspection by Erie and that such negligence was the proximate cause of the injuries sustained, and that that would be so regardless of whether or not they find proximate cause with respect to the claim by the plaintiff against Atlantic.

"What is your answer, jury?

"Yes, no.

"Has that been proven by a preponderance of the credible testimony?"

If the jury says "yes" then "Do you find that Erie should make a contribution to Atlantic?

"Yes, no."

That, in a rough, stumbling fashion, gentlemen, is what I think we have pretty much agreed is the approach. Do you find any fault with the essence of what I have [381] tried to state?

Mr. Altier: None whatsoever by plaintiff.

Mr. Mennis: I think you covered the ground very clearly.

Mr. Roberson: I think that is a good way of proceeding in light of the posture they are taking, in view of the differences that I might have had.

The Court: Fine.

Mr. Altier: I take it we are all in agreement on this procedure and we will then be leaving to your Honor the decision as to which law is applicable to the answer to the jury's question.

The Court: Precisely. We take the fact finders' conclusion of fact and we tailor it to the law, or tailor the law to the facts.

Mr. Altier: And we are all in agreement on that; correct, gentlemen?

Mr. Roberson: Yes.

The Court: You said yes, gentlemen.

* * * * *

CHARGE OF THE COURT

[464] Now, frankly, there's been an issue of law that has come up by reason of the fact that these cars, including the one with which we are concerned, was on a barge in navigable waters. It is an interesting point. We wouldn't have any question if this had happened right a matter of yards on land. It got on the water. Is there another proposition of law involved? We are not completely satisfied from the authorities at this time.

I am explaining to you why we are going to ask you to give us another conclusion of fact with regard to contributory negligence so that when you take your sheet of what you have found to be the facts in this case, we can apply it as a more thorough study of it than the law reveals. And so it will be applicable no matter what the cause of action actually turns out to be when we examine the authorities further.

Do I make myself clear?

[465] Let me show you what that really means. It means that we are going to ask you to determine another proposition of law over and above—proposition of fact, I mean to say, over and above what you would be ordinarily required to do. And I am explaining this to you so that you won't be wondering what is it all about, why is all this. I am making it as clear as time will permit. Under maritime law if this should rove to be a maritime case under the authorities and a further study should reveal that, con-

tributory negligence must be proven by the other side, not by the plaintiff. So we are going to ask you to determine, in addition to what I just told you about with respect to contributory negligence and negligence, whether or not Atlantic Railroad has by a preponderance of the evidence shown that the plaintiff was contributorily negligent. And if you say yes, we want you to tell us by what percentage. In other words, that the railroad, if you should so find, was negligent and 75 per cent, for instance, of the total fault was the railroad and 25 per cent that of the plaintiff. In other words, you list what percentage of fault, of the total fault, the plaintiff contributed to the total fault, and the railroad contributed to the total.

Now, you recognize that is different from the [466] proposition I charged you before where I said the plaintiff must prove negligence, the plaintiff must prove freedom from contributory negligence, and as to that you merely answer yes or no. That is all you do. All we are doing is saying will you go another step further, take the entire record and ask yourselves whether or not, assuming that the burden of proof of contributory negligence is on Atlantic, did Atlantic prove contributory negligence by a preponderance of the credible testimony. And if so, to what extent do you find the plaintiff contributed to the negligence, if any.

• • • • •

[475] So now I come then for the first time to the claim of Atlantic against Erie. Up to now you have been dealing only with the claim of the plaintiff against Atlantic. You know, of course, that you don't get to that claim of [476] Atlantic against Erie unless you find in favor of the plaintiff in connection with the plaintiff's claim against Atlantic. Well, that is obvious. If you so find, then you take into consideration this claim over. Further, if you should find that

Erie Lackawanna was negligent, that fact alone would not entitle plaintiff to any judgment against Atlantic, the only party he has sued.

Now, the fact that I charge you on the law with respect to the claim between Atlantic Coast Line Railroad and Erie Lackawanna must not be taken as an indication of what your verdict should be on the plaintiff's claim against Atlantic Railroad, or on Atlantic Coast Line Railroad's claim against Erie. In giving you the rules of law, I must cover all possibilities.

Atlantic asserts a right to contribution against Erie to the extent of one-half the amount you find in favor of the plaintiff against Atlantic, if you so find.

Atlantic has the burden of proof just as the plaintiff has the burden of proving the claim against Atlantic, Atlantic has the burden of proof, proof by a preponderance of the credible evidence, which I have already repeatedly referred to, on its claim against Erie. The plaintiff has asserted his claim, remember, only against Atlantic. As you know, Atlantic has asserted its claim [477] against Erie.

Now, under law, joint tortfeasors—persons or corporate entities that are jointly responsible for an injury—that is what we are dealing with here. What does that mean? Where two or more parties, while acting independently together contribute to the creation and continuance of a negligent condition, then they are called joint tortfeasors.

Now, the law provides that where an injury is suffered by any person as a result of the negligence of joint tortfeasors and the person suffering an injury recovers a money judgment for such injury against one of the joint tortfeasors, that defendant shall be entitled to recover contribution from the other tortfeasor, the other person who played a part in the production of the negligence. And

thus you must decide whether Erie was also negligent, and is together with Atlantic Coast Line jointly responsible for plaintiff's injuries.

Atlantic's claim then is that if it is held liable to the plaintiff by you, Erie was also negligent and that its negligence was a substantial factor in bringing about the occurrence in which plaintiff was injured.

And as transferee of the car, Erie was under a duty to exercise reasonable care in making an inspection [478] in order to discover defects. And there again you apply the law with regard to what is a reasonable inspection by Erie under all the circumstances that existed at the time.

I remind you that the freight car on which plaintiff was working at the time of his injury had been delivered to Erie Railroad—Erie Lackawanna Railroad on July 27, 1964, and had been in the possession of and had been hauled by that railroad for three days, or until July 30, 1964, the date on which the accident occurred on its car float at Jersey City, New Jersey.

If you find that Erie failed to reasonably inspect that car upon receiving it on July 27th, 1964, and that such failure was a proximate cause of the injury sustained by plaintiff, you shall find in favor of defendant Atlantic Coast Line on its claim over against Erie Lackawanna Railroad Company.

And so the question becomes whether Erie Lackawanna Railroad's acts, as regards its inspection, were negligent and was it performed with reasonable diligence. Was it the kind of inspection and extent of inspection which a reasonable and prudent railroad line would have made? If within the limits of what would constitute a proper routine car inspection, properly conducted at the [479] time and place with which we are concerned and under all the

circumstances then existing either of the defects of the footboard or bracket could not have been discovered, then negligence by Atlantic could not be imputed to Erie despite injuries sustained by the plaintiff, and your verdict must then be in favor of Erie.

[480] If you find that Erie was negligent in that it knew or in the exercise of ordinary care should have known of the existence of either defect, then you must decide whether its negligence was a substantial factor in bringing about plaintiff's injuries.

In this regard the fact that you may find Atlantic Coast Line negligent does not preclude a finding that Erie's negligence played a substantial part in bringing about the plaintiff's injuries.

* * * * *

VERDICT

[505] The Clerk: Members of the jury listen to your verdict as it now stands recorded—

The Court: I think, Mr. Clerk, you better read the entire verdict as it is reflected on Court's Exhibit 1.

The Clerk: Yes, your Honor.

"Question 1. Was the Atlantic Coast Line Railroad negligent?

"Answer: Yes.

"Question 2. If yes, did such negligence contribute in any degree to the plaintiff's injuries?

"Answer: Yes.

"3. Did plaintiff establish that he exercised due care for his own safety?

"Answer: Yes.

"4. If yes on questions No. 1 and No. 2, what is the total amount of plaintiff's damages?

"Answer: $200,000.

"Question 5. If your answer on question No. 3 was no, has defendant established that the plaintiff was contributorily negligent?"

No answer.

"Question 6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad [506] also negligent?

"Yes.

"If so, was such negligence a substantial factor in bringing about plaintiff's injuries?

"Yes."

And so say you all?

The Court: Poll the jury, please.

The Clerk: Members of the jury, you have heard your verdict as it stands recorded.

(The jury was polled and all answered in the affirmative.)

• • • • •

[509] Mr. Roberson: The third-party defendant moves to set aside the verdict and moves for a new trial on the grounds that the verdict was contrary to the law, against the weight of the evidence and that it was excessive.

The third-party defendant also continues its motion which is already on the record with respect to the legal part. And if, as a matter of record, I have to set forth what we have already discussed at length, I will do so at this time.

[510] However, if your Honor thinks that this matter has been covered in our discussions on the record with respect to the legal matter, the claim over juncture, I will not go into it at length except to say also as a matter of law that the third-party plaintiff does not have a claim for contribution against the third-party defendant Erie Lackawanna.

Defendant's Exhibit A

OVERALL VIEW OF CAR ACL 28244

Third-Party Defendant's Affidavit and Notice of Motion to Dismiss Third-Party Complaint, to Set Aside Verdict in Favor of Plaintiff and Against Defendant and for a New Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Lloyd W. Roberson verified April 27, 1970, upon all the pleadings and proceedings had herein, and upon the annexed Memorandum of Law dated April 27, 1970, an application will be made by the undersigned to Honorable Irving Ben Cooper, United States District Judge, at Room 1106 or such other place as he may designate, on May 12, 1970 at 10:00 o'clock in the forenoon thereof, or such other date and time as the court may designate, for an order:

(1) granting permission to all parties to amend their pre-trial memorandums, the pre-trial order and the respective pleadings so as to indicate the maritime jurisdiction over the respective claims;

(2) dismissing the third party complaint as a matter of law on the grounds that (a) the contribution is not allowed under maritime law in cases such as this, and (b) even if New Jersey Law were applied, there would be no contribution where the incident falls within the Longshoremen's and Harbor Workers' Compensation Act.

(3) setting aside the verdict in favor of plaintiff against defendant on the grounds that (a) there was insufficient basis to form a conclusion as to the duration of the weld or bracket fracture, there was insufficient basis to find any casual connection between any break in the handbreak step and plaintiff's incident, and that it was otherwise contrary to law;

(4) setting aside the verdict in favor of plaintiff on the grounds that it was against the weight of evidence;

(5) setting aside the verdict in favor of the plaintiff against defendant on the grounds that such verdict is excessive;

(6) granting a new trial in the alternative;

(7) granting judgment in favor of the third party defendant on the third party claim on the grounds that the preponderance of the evidence shows that if third party plaintiff were negligent it was the primary party causing negligence to the degree it would have been found liable in indemnity to the third party defendant.

Dated: New York, New York
April 27, 1970

Yours, etc.,

LLOYD W. ROBERSON
Attorney for Third Party Defendant
Erie Lackawanna Railway Company
140 Cedar Street
New York, New York 10006
BArclay 7-2500

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I, LLOYD W. ROBERSON, being duly sworn, depose as follows:

I am the attorney for the third party defendant Erie Lackawanna Railway Company.

At the conclusion of the trial of the within action before Honorable Irving Ben Cooper, it was requested that motions be submitted on written papers. This affidavit, the notice of motion, and the memorandum dated April 27, 1970, are submitted for the courts consideration.

There has been no prejudice to plaintiff in the discovery of the application of the maritime law. There is no prejudice to defendant whose attorneys still do not want to recognize its application. Despite the large research facilities of defendant's counsel, no memorandum or even oral citation has been furnished to refute third party defendant's position.

It is respectfully submitted that the third party defendant's application be granted.

LLOYD W. ROBERSON

[Jurat omitted in printing.]

Final Judgment of the District Court in Favor of Plaintiff and Against Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

The above entitled action having been tried before Judge Irving Ben Cooper and a jury on April 13, 14, 15 and 16, 1970; and the jury having answered the following stated interrogatories in the following manner:

1. Was the Atlantic Coast Line Railroad negilgent?

A. Yes.

2. If yes, did such negligence contribute in any degree to the plaintiff's injuries?

A. Yes.

3. Did plaintiff establish that he exercised due care for his own safety?

A. Yes.

4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages?

A. $200,000.00.

5. If your answer on question #3 was no, has defendant established that the plaintiff was contributorily negligent?

6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent?

A. Yes.

If so, was such negligence a substantial factor in bringing about plaintiff's injuries?

A. Yes.

and having returned a verdict in favor of Theodore Benazet in the sum of $200,000.00, against defendant Atlantic Coast Line Railroad Company, and it further appearing that Rule 54b of the Federal Rules of Civil Procedure is applicable in that plaintiff is in monetary need of his money judgment and there is no just reason why judgment ought not be entered for plaintiff even though judgment as between defendant and third party defendant is not entered simultaneously herewith, and there being no prejudice to the defendant or third party defendant by the entry of judgment herein.

It is, on this 30th day of April, 1970,

ORDERED, that judgment in the sum of $200,000.00 be entered in favor of Theodore Benazet, plaintiff, and against Atlantic Coast Line Railroad Company, defendant, with costs.

IRVING BEN COOPER
Irving Ben Cooper
Judge, U. S. D. C.

Judgment entered: 4/30/70

JOHN LIVINGSTON
Clerk

Defendant and Third-Party Plaintiff's Affidavit and Notice of Motion for an Order Setting Aside Verdict of the Jury Against Defendant Atlantic and for a New Trial Dated May 8, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of James J. Mennis, sworn to the 8th day of May, 1970, and upon all the pleadings and proceedings had herein and upon annexed memorandum of law dated May 8, 1970, the undersigned will move this court at a trial term thereof to be held at Room 1505 of the United States Court House, Foley Square, in the Borough of Manhattan, City and State of New York before Honorable Irving Ben Cooper, United States District Judge on the 21st day of May, 1970 at 10:00 in the forenoon of that day, or at such other date and time as the court may designate, for an order setting aside the verdict of the jury against defendant Atlantic Coast Line Railroad Company returned herein on April 16, 1970 and the judgment entered thereon April 30, 1970 and to grant a new trial on the following grounds:

1. The verdict as to said defendant was contrary to law.

2. The verdict as to said defendant is against the weight of the evidence.

3. The evidence in this case is totally insufficient to show liability on the part of defendant.

4. The verdict of the jury is excessive and appears to have been motivated by an excess of sympathy for plaintiff.

This motion is based upon the record and proceedings in this action.

Dated: New York, New York
May 8, 1970

Yours, etc.,

CARTER, LEDYARD & MILBURN

By JAMES J. MENNIS
Attorneys for Atlantic Coast Line Railroad Company,
Defendant and Third-Party Plaintiff
Office and P. O. Address
2 Wall Street
New York, New York 10005

[To all attorneys of record.]

Affidavit of James J. Mennis Annexed

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JAMES J. MENNIS, being duly sworn deposes and says:

I am an attorney associated with the firm of Carter, Ledyard & Milburn, attorneys for Atlantic Coast Line Railroad Company, defendant and third-party plaintiff, and am familiar with all proceedings had herein and make this affidavit in support of defendant's motion for an order setting aside the verdict of the jury herein against it and to grant a new trial on the several grounds set forth in the Notice of Motion.

This judgment was entered on April 30, 1970 on the basis that Rule 54b of the Federal Rules of Civil Procedure is applicable.

It is undisputed that car ACL 28244 was out of the possession of defendant from June 4, 1964 to September 16, 1964 (see list annexed to Answer of Defendant to Interrogatory 1 dated May 31, 1966).

It is also undisputed that this car was delivered by defendant to Georgia Railroad on June 3, 1964 and was in turn delivered to seven different railroads before it was delivered to Erie Lackawana Railroad Company on July 27, 1964. Admittedly, it was either not inspected by Erie Lackawanna on that date nor at any time before the accident happened on July 30, 1964.

The written interrogatories involving Erie Lackawanna Railroad submitted to the jury was answered as follows:

• • • • •

"6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent?

Yes No

If so, was such negligence a substantial factor in bringing about plaintiff's injuries?

Yes No"

From the foregoing it is apparent the jury found that Erie Lackawanna was also negligent and that such negligence was a factor in bringing about plaintiff's injuries.

Defendant's Exhibit M in evidence, shows the last inspection of Atlantic Coast Line Railroad Company of this car while in train 294 after its arrival at Augusta, Georgia on June 3, 1964, showed arrival of train 350 at 5:08 A.M. at which time inspection commenced and was completed at 6:05 A.M. prior to being delivered to Georgia Railroad on June 4, 1964.

A detailed search of its records by defendant could not uncover any record of the brackets on car ACL 28244 having at any time been welded by it. Neither did it have any record from any other carrier in possession of this car at any time having done a welding job on these brackets. The witness Riedinger who did see the weld described it as being a "butcher job". The witness Faller (plaintiff's expert) when questioned about the appearance of the weld, testified if the weld was as bad as described, it would be

unlikely that whoever did the job would make a report of it to the owning line.

The plaintiff as a result of the injuries sustained by him was unable to work for a period of approximately one year after the accident on July 30, 1964. Since returning to work the latter part of July 1965, he has worked continuously as a brakeman for Erie Lackawanna. His testimony indicated he has not lost more than two weeks a year. Third-Party Defendant's Exhibit "A" indicates plaintiff's yearly earnings have increased from $6,000 per year to approximately $9,000. Counsel for Erie Lackawanna has figured his lost earnings to date to be $7,500. His future loss, based on his past earnings at approximately $10,000 or a total undiscounted figure of $17,500.

In this connection it should be noted that when the plaintiff in 1966 instituted suit the ad damnum clause of the complaint was $135,000. No application to increase the amount sued for to $285,000 was made until after counsel had summed up and shortly before the case was given to the jury. The plaintiff is presently employed, has seniority on his job and in all probability will continue to work for a number of years. Under the circumstances the award of the jury was excessive and on this ground alone the verdict should be set aside and a new trial granted.

Both in its third-party summons and complaint served on January 16, 1969 and its amended answer to plaintiff's complaint dated June 20, 1969 Atlantic Coast Line Railroad Company as defendant and third-party plaintiff demanded judgment that the complaint be dismissed as to it, or, in the alternative

"that defendant and third-party plaintiff Atlantic Coast Line Railroad Company demands judgment against

third-party defendant Erie Lackawanna Railroad Company [*for all sums that may be adjudged against the defendant Atlantic Coast Line Railroad Company*] or, that said defendant and third-party plaintiff be entitled to judgment against third-party defendant for contribution as a joint tort-feasor for any sum that may be adjudged against defendant Atlantic Coast Line Railroad Company in favor of plaintiff Theodore Benazet." (Emphasis added).

Deponent at the conference in the robing room recalls the court making a reference that it did not think indemnity could be sustained. However, the only comment deponent recalls making in response to the court's reference to indemnity, was that defendant Atlantic Coast Line Railroad Company was relying principally on its right to contribution. Deponent has no recollection of withdrawing defendant Atlantic Coast Line Railroad Company's right of indemnity as indicated in page 1 of "Statement of counsel for third-party defendant Erie Lackawanna that

"before submission of the case to the jury the indemnity claim was withdrawn."

Deponent does not contest the issue of the application of Maritime Law in this case.

It is respectfully submitted that the judgment entered herein against defendant Atlantic Coast Line Railroad Company on April 30, 1970 be set aside and a new trial granted.

(Sworn to by James J. Mennis on May 8, 1970).

Affidavit of Lloyd W. Roberson in Opposition to Motion Dated May 8, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I, Lloyd W. Roberson, being duly sworn, depose as follows:

1. I am the attorney for the third party defendant, and the attorney who tried the within action on behalf of the third party defendant.

2. This affidavit is submitted in opposition to the notice of motion, dated May 8, 1970 and served on May 11, 1970, at 5:07 P. M.

3. This affidavit is primarily to keep the records straight as to certain points contained in the affidavit of James J. Mennis submitted in support of said motion.

4. Mr. Mennis states that "Admittedly, it was either not inspected by Erie Lackawanna on that date nor at any time before the accident happened on July 30, 1964." Erie Lackawanna did not admit to making no inspection of the car in question. Erie Lackawanna does admit that there

is no record of any inspection procedure of climbing the ladder to closely observe the handbrake of the car in question.

5. Mr. Mennis deposes that he has no recollection of withdrawing the claim for indemnity.

6. As the court will recall, at a time when all counsel were in the robing room with the presiding judge, presiding Judge Irving Ben Cooper indicated to the attorney for the plaintiff that the attorney for the plaintiff would probably want to amend his pleadings to conform to the proof. Honorable Irving Ben Cooper also asked Mr. Mennis, counsel for the defendant and third party plaintiff, whether he was continuing his indemnity claim. Mr. Mennis stated that he was withdrawing the claim based on indemnity.

7. The effect of such announcement was to set the pattern as to the areas in which the jurors would be asked specific questions or give responses to specific interrogatories.

8. After the statement of withdrawal by Mr. Mennis, there was no further consideration given to charging the jury relative to the same or proposing any specific interrogatories concerning such indemnity.

9. Assuming for the sake of argument, this court was faced with a situation where either indemnity or contribution might possibly lie, the quantum of proof and the nature of proof would differ.

10. Furthermore, such withdrawal had a bearing on the approach that I took with the jury. A party in the posi-

tion of the defendant is much less likely to obtain an affirmative finding of negligence on the part of the third party defendant where the jurors feel that an indemnity may be the remedy. The defendant and third party plaintiff is having its cake and eating it too if it were allowed to reassert the indemnity claim in the present posture of the action.

11. Inasmuch as it has become necessary to make this affidavit, I also refer to a statement made by J. J. Mennis in his affidavit of April 24, 1970. Mr. Mennis indicates that the memo of law came to his attention in the late afternoon of Wednesday, April 15, 1970. In point of time, Mr. Mennis was advised of the memo about five minutes after he commenced interviewing Dr. Balensweig, while the court was in recess. Mr. Mennis was told by me that he look at the memo as soon as possible, if not then, because he might want to have his office check on some of the points contained in the memorandum.

LLOYD W. ROBERSON

[Jurat omitted in printing.]

Notice of Appeal of Defendant and Third-Party Plaintiff Dated June 1, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

Notice is hereby given that Atlantic Coast Line Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action in favor of plaintiff and against defendant, Atlantic Coast Line Railroad Company, on the 30th day of April, 1970.

Dated: June 1, 1970

CARTER, LEDYARD & MILBURN

By /s/ DEVEREUX MILBURN
A Member of the Firm
Attorneys for Atlantic Coast Line Railroad Company, Defendant and Third-Party Plaintiff
Office and P. O. Address
2 Wall Street
New York, New York 10005

[To all attorneys of record.]

Opinion With Judgment on Third-Party Claim Inscribed Thereon

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1404

THEODORE BENAZET,

Plaintiff,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff,

against

ERIE LACKAWANNA RAILROAD COMPANY,

Third Party Defendant.

Judgment entered thereon 7/17/70 /s/ JOHN LIVINGSTON *Clerk*

(Appearances: Omitted in printing)

IRVING BEN COOPER, *D.J.*:

Plaintiff Benazet brought suit against defendant Atlantic Coast Line Railroad Company (Atlantic) for damages suffered as a result of his fall from a railroad boxcar owned by Atlantic claiming Atlantic negligently released the car into commerce in a defective condition and failed to inspect, repair and warn of the defective condition. This action was removed to this Court from the Supreme Court, New York County, by Atlantic, federal jurisdiction resting

upon diversity of citizenship. Thereafter, Atlantic impleaded plaintiff's employer Erie Lackawanna Railroad Company (Erie) asserting that Erie was in possession of the car at the time of the accident and was negligent in failing to properly inspect the car so as to discover any defective condition and, thus, liable either in contribution or indemnity for either one-half or the full amount, respectively, of any judgment plaintiff might recover against Atlantic.

Following a four day trial, the jury on April 16, 1970 returned a verdict in favor of plaintiff in the amount of $200,000. Judgment was entered as to the main claim on April 30, 1970 pursuant to Rule 54(b), F.R.Civ.P.

We are here faced with certain legal contentions the resolution of which will determine the third party action. In connection with these questions of law including jurisdiction, motions have been filed by all parties herein to amend the pleadings to conform with the proof. Finally, both defendant and third party defendant have moved on several grounds for an order setting aside the verdict or in the alternative granting a new trial.

* * * * *

On July 30, 1964 Benazet was injured when, in the course of his duties as a brakeman employed by Erie, he attempted to tighten a handbrake on a railroad boxcar owned by Atlantic. Plaintiff claimed, and the jury evidently so found, that the accident and consequent injuries occurred generally as follows: as he was applying the handbrake a rotted foot board gave way under his foot causing his weight to go upon the handbrake assembly which in turn broke away from the car as a result of the defective condition of the brackets affixing the handbrake assembly to the freight car resulting in plaintiff's fall. Proof at trial which the jury was entitled to credit, established that the brackets

were defective in that they had fissures over an inch long, a condition requiring years to develop. Some time prior to the accident an attempt had been made to repair the breaks in each bracket by spot welding, a highly improper procedure at best and performed so poorly herein that one witness described it as a "butcher job."

This car owned by Atlantic left its possession on June 4, 1964, less than two months prior to the accident. Between that date and July 27, 1964 when it was delivered to Erie, it is acknowledged that it had been in the possession of and operated over approximately seven different railroads in different parts of the country. Erie had this car in its possession for three days prior to July 30, 1964, the date of plaintiff's injury. Nevertheless, based on the testimony with respect to the age of the defects, we believe there was adequate evidence to support the jury's requisite finding on the element of proximate causation that Atlantic was either the cause or knew or should have known of the existence of the defects in the brackets of the car it placed in commerce and that there was no superceding cause of the accident.

At the time of the accident the boxcar from which plaintiff fell was on a carfloat owned by Erie. The carfloat was a barge (having no motor power) with tracks to accommodate railroad cars. This carfloat was moored on the Hudson River near the New Jersey shore next to an Erie float bridge—a floating pier used for the loading or unloading of carfloats. The carfloat was fully loaded and ready for its scheduled towing across New York Harbor to connect with the Long Island Railroad. At the time of his fall to the dock of the carfloat, plaintiff was tightening the handbrake involved here in order to make the last boxcar more secure for that voyage.

Excessiveness of the Verdict; Other Post Trial Motions

At the outset we dispose of defendant's and third party defendant's various motions to set aside the verdict and grant a new trial, which we denied after the jury's verdict but with leave to renew in writing.

As to the motions addressed to the claimed excessiveness of the jury's verdict: we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deap-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time.

Wages lost before trial, loss of future wages and increments thereon (the reasonable expectancy of working years was 22 as agreed upon), the medical expense actually incurred and reasonably to be anticipated, were closely calculated and met with no disturbing opposition. See *Grunenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968).

We were very strict in holding the jury to these items of damage only which the law countenances: [From the trial judge's draft of the charge to the jury (court reporter's minutes not presently available).]

> "Now, what I have been laying down to you as to the law of damages is the law's formula for the assessment of damages. You have no power to alter that formula. Yes, you have the power under the law to determine the proper amount, if you should so find, of each item of damage, but you do not have the legal power to substitute another formula for the

only one that the law recognizes. On all the items of damage you are to be guided by your common sense. As with everything else in this case, you are to be guided by what life has taught you, the experiences you have had, and such an award as you make must bear a reasonable relationship to the nature and extent of the injuries which you find, and all these items of damage then are to be totaled up into one lump sum."

With regard to the remaining motions: as indicated by our factual recital above, there was sufficient credible evidence of record to show liability on the part of defendant; the verdict was neither contrary to law; nor against the weight of the evidence.

Maritime Jurisdiction

After two days of trial and on the eve of the Court's charge to the jury, Erie served and filed a memorandum of law contending for the first time that it had only then come to realize (and its hasty research confirm) that this case was properly one of maritime jurisdiction. Prior thereto, and in accordance with the pleadings, all parties proceeded under the assumption that New Jersey law governed both the main action and the claim over, as the requests to charge submitted by all parties at that time reflect.

Having insufficient time to resolve the difficult question of which law properly governed, we resolved, with the advance approval of all parties, to frame our charge and propound special interrogatories to the jury so as to prevent, hopefully, any possible need for a retrial regardless of the law eventually found applicable to the precise factual

area defined herein. In substance, the jury specifically found Atlantic negligent and such negligence a proximate cause of plaintiff's injuries; plaintiff was not contributorily negligent; damages of $200,000; Erie also negligent and such negligence likewise a proximate cause of plaintiff's injuries.[1]

The jury's finding that plaintiff was not contributorily negligent, amply supported by the trial record, removed any problem as to whether any such negligence would be a complete bar or whether, instead, comparative negligence under maritime law was applicable. The remaining question is whether, despite the jury's finding of negligence by Erie as well as Atlantic, Erie is nevertheless entitled to dismissal of the third party action because: (1) either maritime law governs and contribution is not permitted in a non-collision suit such as this, or, (2) regardless of whether maritime law governs, under the New Jersey Joint Tortfeasors Contribution Act, 2A N.J.S.A. Chap. 53A, contribution is not available from an employer such as Erie against

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[1] The interrogatories propounded and the jury's responses in full are as follows:

1. Was the Atlantic Coast Line Railroad negligent? A. Yes.
2. If yes, did such negligence contribute in any degree to the plaintiff's injuries? A. Yes.
3. Did plaintiff establish that he exercised due care for his own safety? A. Yes.
4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages? A. $200,000.
5. If your answer on question #3 was no, has defendant established that the plaintiff was contributorily negligent? If yes, what percent? [not answered].
6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent? A. Yes.
7. If so, was such negligence a substantial factor in bringing about plaintiff's injuries? A. Yes.

whom plaintiff's exclusive remedy is a compensation act, in this case the Longshoremen's and Harbor Workers' Act.[2]

There is undisputed diversity of citizenship jurisdiction over this action. Jurisdiction under 28 U.S.C. § 1332 being present, we believe it unnecessary, even with mari-

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[2] Atlantic informed the Court and Erie during the course of trial that it withdrew its cause of action for indemnity. Accordingly, the Court charged the jury only on Atlantic's third party claim for contribution and the interrogatories submitted to the jury did not inquire into the question of active-passive or primary-secondary negligence as between Atlantic and Erie. No objection was taken by Atlantic to either the Court's charge on the claim over or to the interrogatories propounded.

This withdrawal was so understood by Lloyd W. Roberson, Esq., counsel for Erie who stated on the first page of a memorandum dated April 27, 1970 in support of his motions to dismiss, set aside the verdict and for a new trial: "Before submission of the case to the jury the indemnity claim was withdrawn."

Nevertheless, James J. Mennis, Esq., counsel for Atlantic, stated for the first time in the course of an affidavit (pages 4-5 thereof) dated May 8, 1970 in support of various post-trial motions to set aside the verdict and judgment thereon and grant a new trial:

> "However, the only comment deponent recalls making in response to the court's reference to indemnity, was that defendant Atlantic Coast Line Railroad Company was relying principally on its right to contribution. Deponent has no recollection of withdrawing defendant Atlantic Coast Line Railroad Company's right of indemnity. . . ."

In response Mr. Roberson avers:

> "6. As the court will recall, at a time when all counsel were in the robing room with the presiding judge, presiding Judge Irving Ben Cooper indicated to the attorney for the plaintiff that the attorney for the plaintiff would probably want to amend his pleadings to conform to the proof. Honorable Irving Ben Cooper also asked Mr. Mennis, counsel for the defendant and third party plaintiff, whether he was continuing his indemnity claim. Mr. Mennis, stated he was withdrawing the claim based on indemnity.
>
> 7. The effect of such announcement was to set the pattern as to the areas in which jurors would be asked specific questions or give responses to specific interrogatories.
>
> 8. After the statement of withdrawal by Mr. Mennis, there was no further consideration given to charging the jury rela-

time law governing, that the parties amend their pleadings to assert the possible additional jurisdictional basis in ad-

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tive to the same or proposing any specific interrogatories concerning such indemnity.

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10. Furthermore, such withdrawal had a bearing on the approach that I took with the jury. A party in the position of the defendant is much less likely to obtain an affirmative finding of negligence on the part of the third party defendant where the jurors feel that an indemnity may be the remedy. The defendant and third party plaintiff is having its cake and eating it too if it were allowed to re-assert the indemnity claim in the present posture of the action." Affidavit of Lloyd W. Roberson, Esq., May 12, 1970.

Let's look at the record:

"The Court: Now Mr. Mennis—on the record—we did so much, I think we accomplished a lot off the record during the course of trial, but we can place on the record what we have agreed to.

Let the record show that you agreed to withdraw against Erie your claim for indemnity and to rely only on the claim of contribution.

Mr. Mennis: Yes, that's correct."

Minutes of Benazet v. Atlantic Coast Line v. Erie, April 16, 1970 (not transcribed as of the date of this opinion).

We need not rest solely upon this unequivocal withdrawal, however, for, in any event, the nature of the claims of negligence asserted against Atlantic by plaintiff and, in turn, against Erie by Atlantic, combined with the evidence developed at trial and the jury's finding that both were negligent appears to preclude the possibility of indemnity being successfully maintained. Atlantic's negligence was not "passive" or "secondary" and Erie's negligence "sole," "active" or "primary." See generally Gilmore & Black, The Law of Admiralty at 367-74 (1957). We believe the active-passive standard would be controlling on a claim of indemnity in this situation where the employer third party defendant has no contractual relationship with the defendant and third party plaintiff and where the defendant third party plaintiff cannot be held liable without fault. Compare *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 132-33 (1956). There is no warranty running from Erie to Atlantic which might justify finding a contractual basis for indemnity. Compare *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 320-21 (1964).

miralty, 28 U.S.C. § 1333.[3] Accordingly, the motions to amend are denied.

Plaintiff's fall from the boxcar occurred on board a car-float, a vessel then moored to a floating pier in navigable waters, loaded and scheduled to be towed across New York Harbor. While the question is not wholly free from doubt, we conclude that federal maritime law is the substantive law governing this case, both as to the prime suit and the claim over. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1958). See also, *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 338-40 (1953) (a strikingly similar fact situation in which the Supreme Court held O'Rourke could not maintain an FELA action against his employer, his exclusive remedy held to be the Harbor Workers' Act); *Nogueira* v. *N.Y., N.H. & H. R. Co.*, 281 U.S. 128, 134 (1930). Indeed, both Atlantic and Erie appear to so concede. See Memorandum of Law of Defendant and Third Party Plaintiff, May 11, 1970, p. 1; Memorandum of Law of Third Party Defendant, April 27, 1970.

Contribution

Having found maritime law controlling, we are faced with the perplexing and often not wholly consistent body of law which frequents this area and from which we must

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[3] Where the suit is, as here, *in personam*, it may be brought in federal court under the head of diversity of citizenship jurisdiction on the law side of the court (entitling one to a jury trial) on the basis that "Congress since 1789, in giving Federal District Courts original jurisdiction of civil cases in admiralty, has saved 'to suitors in all cases all other remedies to which they are otherwise entitled.'" *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 U.S. 355, 359-60 (1962).

obtain our guidance as to whether contribution is available. The leading case is *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) in which the Supreme Court was faced with a conflict among the Circuits as to the existence and extent of contribution in non-collision maritime torts. A ship owner, sued for negligence and unseaworthiness by an injured employee of a shoreside contractor engaged by the ship owner to make repairs on a ship moored in navigable waters, impleaded the contractor seeking contribution on the ground the contractor's negligence had contributed to the injuries.

It was the conclusion of the Supreme Court that:

> "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. . . . Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.
>
> In view of the foregoing, and because Congress while acting in the field has stopped short of approv-

ing the rule of contribution here urged, we think it inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. at 285-87.

This decision still stands and Congress has not acted to extend the law of contribution to non-collision matters. There has, however, been considerable erosion of the effect of *Halcyon*. Thus, in subsequent decisions the Supreme Court held contractually-based indemnity actions were maintainable although actions for contribution between joint tortfeasors were not. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). See also, Gilmore & Black, The Law of Admiralty at 367-74 (1957).

Conceding that maritime law is applicable and that *Halcyon*, while often circumvented has not been overruled, Atlantic argues that there is a void in federal maritime law on the subject of contribution in non-collision cases and that, under settled principles, state law—here, the New Jersey Joint Tortfeasors Contribution Act—may be applied to fill that void as a supplement to the general maritime law. In the absence of a federal provision or common law right of action state wrongful death statutes have been invoked to recover for a maritime death. See *The M/V "Tungus"* v. *Skovgaard*, 358 U.S. 588 (1958); *Hess* v. *United States*, 361 U.S. 314 (1960). There, too, Congress had enacted statutes providing for wrongful death actions in a limited number of situations, but had "stopped short" of providing full coverage. However, this possible analogy to *Halcyon* and the Supreme Court decision to not extend the maritime rule of contribution was not developed by the Supreme Court in its decisions incorporating state wrongful death statutes into maritime law.

In *Frueh* v. *Kupper* v. *Frueh*, 54 N.J. Super. 296, 148 A.2d 743 (1959) the New Jersey Superior Court reasoned:

> "The question of applicability of a state joint tortfeasors act was not discussed in the Halcyon case. The accident here occurred in waters within the geographical boundaries of New Jersey. The language of the Joint Tortfeasors Act has sufficient scope to include a maritime cause of action which arises in New Jersey. This act is broadly construed." 148 A.2d at 749.

The question is a close one. We believe, however, that the wrongful death cases are properly distinguishable and that *Halcyon* is determinative of the case at bar. The Supreme Court in *The Tungus* before adopting the state right of action for wrongful death reiterated "the established principle of maritime law that in the absence of a statute there is no action for wrongful death." 358 U.S. at 590. Thus, in adopting state wrongful death statutes, the Court never held that it had the power to create such an action at common law, but would refuse to do so because it was not convinced of its value and believed Congress by its selective action had expressed a contrary intent.

In contrast, in considering its power to fashion an extension of the existing maritime rule of contribution, the Supreme Court in *Halcyon* stated "we would feel free to do so here if wholly convinced that it would best serve the ends of justice." 342 U.S. at 285. Thus, as we see it, the *Halcyon* ruling that "[i]n view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so," cannot be seen as

merely leaving a void in federal maritime law respecting contribution which a court is free to fill by the adoption of a state contribution statute. We believe the Supreme Court has stated that with much Congressional legislation already in existence in this area, the decision whether to extend a right of contribution here and, if so, in what manner, must be left to Congress in order to accommodate the "many groups of persons with varying interests . . . vitally concerned with the proper functioning and administration of these Acts as an integrated whole."[4] 342 U.S. at 286.

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[4] Even if the New Jersey Joint Tortfeasors Contribution Act were adopted, the result would be far from clear. The Joint Tortfeasors Act is inapplicable to a third party suit against the employer of the injured plaintiff, at least where workmen's compensation exists and is the employee's exclusive remedy against his employer. See *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A. 2d 752 (App. Div. 1954). The Supreme Court in adopting state wrongful death statutes holds that the right must be enforced as an integrated whole, with whatever conditions and limitations the creating state has attached. See *The m/v Tungus* v. *Skovgaard*, 358 U.S. at 591-94.

Here, the third party suit is against plaintiff's employer. While state workman's compensation is inapplicable, plaintiff is covered by the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. In the virtually identical fact setting of *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1952) the Supreme Court held that railroad employee's remedy was under the Harbor Workers' Act exclusively, and not under the F.E.L.A.

Since *O'Rourke*, however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for unseaworthiness, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act "shall be exclusive and in place of all other liability." See *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expansive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid "a harsh and incongruous result" leads us to conclude that this plaintiff

CONCLUSION

Accordingly, we hold that the third party claim for contribution must be dismissed as a matter of law.

SO ORDERED:

New York, N. Y.
July 2, 1970

United States District Judge

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would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.

If we are correct, then the Harbor Workers' Act would not be plaintiff's exclusive remedy and the New Jersey Joint Tortfeasors Law might in this context permit an action for contribution against Erie. If so, then two questions would still remain: (1) is unseaworthiness necessarily present here in light of the factual setting of a defective boxcar on board Erie's carfloat and the jury's finding that Erie was negligent? (2) If yes, might Erie nonetheless be entitled to indemnity from Atlantic for any liability to plaintiff on the ground Atlantic was primarily responsible and, if so, would this not preclude joint contribution?

We find it unnecessary to travel this tortuous path to a possible conclusion for the reason already set forth—we believe *Halcyon* determinative of the question here presented.

Amended Notice of Appeal Dated July 2, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

Notice is hereby given that Atlantic Coast Line Railroad Company, Defendant and Third-Party Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action in favor of Erie Lackawanna Railroad Company, Third-Party Defendant, and against Atlantic Coast Line Railroad Company, Defendant and Third-Party Plaintiff, on the 2nd day of July, 1970 dismissing its Third-Party Complaint, and the Judgment entered thereon July 17, 1970.

Dated: July 20, 1970

CARTER, LEDYARD & MILBURN

By HOMER R. COOLIDGE

Attorneys for Atlantic Coast Line Railroad Company, Defendant and Third-Party Defendant

[To all attorneys of record.]

Opinion of the Court of Appeals and Judgment Thereon

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 474-475—September Term, 1970.

(Argued March 16, 1971 Decided April 23, 1971.)

Docket Nos. 35278, 35279

THEODORE BENAZET,

Plaintiff-Appellee,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY,

Third-Party Defendant-Appellee.

Before:

SMITH and MOORE, *Circuit Judges,*
and TIMBERS,* *District Judge.*

* Chief Judge, United States Court for the District of Connecticut, sitting by designation.

Appeal from $200,000 judgment entered upon jury verdict after trial in United States District Court for Southern District of New York, Irving Ben Cooper, *District Judge,* and from order dismissing third party complaint. 315 F. Supp. 357 (S.D.N.Y. 1970). Affirmed.

JOSEPH P. ALTIER, New York, N. Y. (Bromsen & Gammerman, on the brief), *for plaintiff-appellee.*

DEVEREUX MILBURN, New York, N. Y. (Carter, Ledyard & Milburn, Frank G. Kurka, James J. Mennis and Jerome L. Getz, on the brief), *for Atlantic Coast Line Railroad Company, defendant and third party plaintiff-appellant.*

LLOYD W. ROBERSON, New York, N. Y., *for Erie Lackawanna Railroad Company, third party defendant-appellee.*

TIMBERS, *District Judge:*

Appellant Atlantic Coast Line Railroad Company (Atlantic) appeals from a $200,000 judgment entered against it after a four day jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, *District Judge,* and from an order entered by Judge Cooper after trial dismissing Atlantic's third party complaint against the Erie Lackawanna Railroad Company (Erie). 315 F. Supp. 357 (S.D.N.Y. 1970).

The accident occurred July 30, 1964. Plaintiff was employed as a yard brakeman by Erie. He sustained injuries

while working on a box car owned by Atlantic. The box car was being moved from the shore near Jersey City, New Jersey, over a float bridge and on to a carfloat which is a barge with railroad tracks to accommodate railroad cars. The carfloat was owned by Erie. It was moored on the Hudson River which is part of the navigable waters of New York Harbor just off the Jersey shore. Plaintiff fell from the box car to the deck of the carfloat. His fall was caused by a defective handbrake on the box car which he was attempting to tighten while standing on a footboard which had rotted and decayed. When the footboard and handbrake assembly gave way, plaintiff was catapulted to the deck of the carfloat. No issue is raised on this appeal with respect to the defective conditions of the box car owned by Atlantic being the proximate cause of plaintiff's injuries.

Atlantic's essential claims on appeal are (1) that the case was erroneously submitted to the jury on the issue of contributory negligence; (2) that Atlantic's asserted right of contribution between joint tort feasors in a non-collision case was erroneously rejected in the dismissal of its third party complaint against Erie; and (3) that the trial judge erroneously refused to set aside the verdict as excessive. Finding no error, we affirm.

I.

We need not tarry long over Atlantic's claim that the case was erroneously submitted to the jury on the issue of contributory negligence. In the first place, in response to a written interrogatory submitted with the approval of all counsel, including Atlantic's, the jury expressly found that plaintiff was not contributorily negligent; and our independent examination satisfies us that this finding is adequately supported by the record. Furthermore, Atlantic's counsel not only did not object to the manner in which the

judge submitted the issue of contributory negligence to the jury, but he participated in the formulation of the charge as given on this issue.

What happened was somewhat unusual. At the conclusion of the third day of the trial of an action that had been pending for four years, counsel for Erie submitted a memorandum of law indicating for the first time that general maritime law governed rather than the common law as all counsel and the judge had supposed up to that point. Confronted with this development at the close of the evidence and on the eve of summations and charge, Judge Cooper resorted to what strikes us as a sensible, practical method of resolving the dilemma: he invited all counsel to confer with him and to participate in the formulation of the charge and written interrogatories to be submitted to the jury, especially on the issue of contributory negligence. They did. There emerged a charge, agreed to by all counsel, under which the jury was instructed with respect to the applicable rule of contributory negligence under common law (complete bar to recovery) and under general maritime law (comparative negligence). The charge was accompanied by seven written interrogatories, also agreed to by all counsel, in response to which the jury was instructed to decide (No. 3) whether plaintiff had established "that he exercised due care for his own safety" (which the jury answered in the affirmative), or (No. 5), in the event its answer were in the negative to No. 3, whether defendant had established "that plaintiff was contributorily negligent" and, if so, "what per cent" (which the jury did not answer, having answered No. 3 in the affirmative).[1]

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[1] The seven written interrogatories, together with the jury's responses, are set forth in full in the District Court's opinion. 315 F. Supp. 357, 360 n. 1.

We have no doubt that the trial judge, if given more time to determine whether the common law or general maritime law governed, would have preferred to have submitted the issue of contributory negligence to the jury differently. We are satisfied, however, under the circumstances that essential justice was done. And certainly Atlantic is foreclosed from claiming error with respect to a charge in which it acquiesced and to which it interposed no objection until after the return of a substantial verdict against it.

II.

Atlantic's third party claim against Erie was based alternatively on indemnity or contribution between joint tort feasors. At trial, in response to the judge's inquiry before charging the jury, Atlantic's counsel withdrew its indemnity claim. Such withdrawal was confirmed by Atlantic's counsel at the time of oral argument before us.

Atlantic however continues vigorously to press its contribution claim before us as it did below. It points to the jury's answers to written interrogatories Nos. 6 and 7 where the jury found Erie, as well as Atlantic, to have been negligent, and Erie's negligence to have been a substantial factor in bringing about plaintiff's injuries. Atlantic's contribution claim, so far as the equities are concerned, is appealing. But the controlling law is to the contrary.

Plaintiff having been injured aboard a vessel upon navigable waters, clearly general maritime law controls. *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, 628 (1959); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953). The Supreme Court has expressly held that under general maritime law there is no contribution among joint tort

feasors in a non-collision case, noting that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-87 (1952).

Atlantic urges a variety of arguments, not without ingenuity, which add up to an invitation to us either to ignore *Halcyon* or to urge the Supreme Court to overrule it. We decline the invitation and adhere to the view expressed by this Court, through Judge Friendly, in *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969):

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . ."

For substantially the same reasons, we likewise decline Atlantic's invitation to permit "supplementation" of general maritime law with the New Jersey Joint Tortfeasors Act, N.J. Rev. Stat. §2A:53A (1952). Aside from the controlling bar of *Halcyon* to contribution in a non-collision case, we note that it is doubtful that the New Jersey statute is applicable to a third party action against the employer of an injured plaintiff. *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954). And in any event, Atlantic's basic argument that a state statute on contribution may be applied to fill a void in federal maritime law completely misses the point of *Halcyon*. There the Supreme Court did not create a *void* in the maritime law; it squarely held there is *no right of contribution* among tort feasors in a non-collision case.

We hold that Judge Cooper correctly dismissed Atlantic's third party complaint against Erie.

III.

Finally, Atlantic claims that the trial judge erred in refusing to set aside the $200,000 verdict as excessive and it urges us to order a remittitur.

Plaintiff, 37 years of age, sustained serious and painful injuries to his face, head, both legs and back. He has a 50% permanent disability in the use of his right leg and a 35% disability in the use of his left leg and low back. He was hospitalized for five weeks and was out of work for approximately one year following the accident. His annual wages were roughly $6,000. His life expectancy was 35 years, his working expectancy 22 years. His hospital and medical expenses were approximately $3,000. While he has returned to his former job, the record clearly establishes the permanency of his injuries, the diminution of his prospective earnings and the extent of his pain and suffering, past and future.

We note that the trial judge, who, along with the jury, was in a better position than we to observe plaintiff's demeanor and to assess his injuries, had this to say:

> ". . . we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deep-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time."

We hold that the verdict, while substantial, was not excessive. It was not "so high that it would be a denial of justice to permit it to stand." *Dagnello* v. *Long Island R.R. Co.*, 289 F.2d 797, 806 (2 Cir. 1961). Nor was it "fantastic." *LaFrance* v. *New York, N. H. & H. R.R. Co.*, 292 F.2d 649, 650 (2 Cir. 1961), *aff'g* 191 F. Supp. 164, 168-71. See also *Gasperino* v. *Larsen Ford, Inc.*, 426 F.2d 1151, 1154 (2 Cir. 1970); *Bazydlo* v. *Placid Marcy Co.*, 422 F.2d 842, 843 (2 Cir. 1970); *Diapulse Corp. of America* v. *Birtcher Corp.*, 362 F.2d 736, 744 (2 Cir.), *cert. dismissed*, 385 U.S. 801 (1966).

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April one thousand nine hundred and seventy-one.

Present:

Hon. J. Joseph Smith,
Hon. Leonard P. Moore, Circuit Judges,
Hon. William H. Timbers, District Judge.

Theodore Benazet,

Plaintiff-Appellee,

v.

Atlantic Coast Line Railroad Company,

Defendant and Third-Party Plaintiff-Appellant,

v.

Erie Lackawanna Railroad Company,

Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and is hereby affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk